

# Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law

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*This Article explores the ways in which important elements of disability discrimination law are consistent with feminist and communitarian theory. The Article explains how disability discrimination law accounts for the relationships of individuals, recognizes that differences between individuals often mandate (as opposed to preclude) the application of equality principles, addresses issues of dependency in the context of equality, encourages communication and dialogue between parties, holds that equality is implicated when the state unnecessarily keeps individuals separated from their communities, and accounts for the interests of nonclaimants in determining the equality rights of claimants. The Article argues that these characteristics of disability discrimination law are reflected in feminist theory and communitarian theory, and are, as a result, in some tension with the kind of liberal theory upon which much of the law that prohibits discrimination on the basis of race and sex is grounded.*

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## INTRODUCTION

Discrimination law in the United States generally prohibits certain entities (primarily employers, government agencies, and places of public accommodation) from taking certain traits (such as race and sex) into account in distributing jobs, goods, and services. American discrimination law, like so much of American law and culture, is generally individualistic in its focus; it encourages covered entities to disregard group membership (e.g., the fact that an individual is of a certain race or sex) and focus instead on an employee's talents and abilities (in the case of employment), needs (in the case of public goods and services), or ability to pay (in the case of private goods and services).

There is much to disability discrimination law that is consistent with these principles. Disability discrimination law requires covered entities to treat individuals with disabilities according to their abilities, needs, and contributions rather than according to stereotypes and myths based on group membership. Disability discrimination law, for example, requires that the determination of whether an individual with a disability is able to perform a particular job (whether, in other words, she is a "*qualified* individual with a disability")<sup>1</sup> must be an individualized assessment focused on her particular circumstances.<sup>2</sup>

On other matters, however, disability discrimination law differs from discrimination law that protects individuals on the basis of other traits such as race and sex. (For the sake of brevity, I will refer to the latter as "traditional discrimination law.") One of the differences that has received considerable attention from commentators is that disability discrimination protection often

<sup>1</sup> 42 U.S.C. § 12111(8) (2000) (emphasis added).

<sup>2</sup> See, e.g., *Weigel v. Target Stores*, 122 F.3d 461, 466 (7th Cir. 1997); see also 29 C.F.R. pt. 1630 app. § 1630.2(m) (2001) (noting that "[t]he determination of whether an individual with a disability is qualified . . . should be based on the capabilities of the individual with a disability at the time of the employment decision . . ."). For other examples of individualized assessments under disability discrimination law, see *infra* notes 109–12 and accompanying text.

requires that an individual with a disability be treated *differently* from others.<sup>3</sup> This difference is most clearly present in the obligation of covered entities under statutes such as the Americans with Disabilities Act (ADA)<sup>4</sup> and the Rehabilitation Act of 1973<sup>5</sup> to reasonably accommodate qualified individuals with disabilities, an obligation that is not owed to able-bodied individuals. In accommodating an employee with a disability, for example, an employer must treat that employee differently from able-bodied employees (and differently from other disabled employees with different disabilities) in the same workplace.<sup>6</sup> The principle of reasonable accommodation, in other words, seeks to provide equality of opportunity through the *differential* treatment of qualified individuals with a disability.<sup>7</sup>

Although commentators have noted this and other differences between disability discrimination law and traditional discrimination law,<sup>8</sup> there has been, in my estimation, insufficient attention paid to the ways in which the distinctions between the two categories of discrimination law reflect deeper differences that go to issues of theory. Although much of traditional discrimination law is consistent with liberal theory, important elements of disability discrimination law are consistent with feminist theory or communitarian theory, or both, and are, therefore, in some tension with liberal theory. I argue in this Article that feminism and communitarianism can contribute in important ways to our understanding of the theoretical and normative underpinnings of disability discrimination law.<sup>9</sup>

<sup>3</sup> See *infra* notes 142–51 and accompanying text.

<sup>4</sup> 42 U.S.C. § 12112(b)(5)(A) (2000).

<sup>5</sup> 29 U.S.C. § 701(a)(4) (2000).

<sup>6</sup> The focus of this Article will be primarily (though not exclusively) on issues of employment.

<sup>7</sup> Title VII requires employers to accommodate employees on the basis of religion. See 42 U.S.C. § 2000e(j) (2000). The Supreme Court, however, has interpreted this provision narrowly, holding that anything “more than a *de minimis* cost” would constitute an undue hardship, exempting the employer from an obligation to accommodate. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). Congress, in enacting the ADA, made it clear that the obligation of employers to accommodate under the ADA is considerably more extensive than under Title VII. See H.R. REP. NO. 101-485(II), at 68 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 350.

<sup>8</sup> See, e.g., sources cited *infra* note 19.

<sup>9</sup> To my knowledge, there has been no discussion in the legal academic literature on the relationship between disability rights and communitarian theory. There has been, however, some discussion of the relationship between disability rights and feminist theory. See, e.g., Harlan Hahn, *Feminist Perspectives, Disability, Sexuality, and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN’S STUD. 97 (1994); Anita Silvers, *Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights*, 13 BERKELEY WOMEN’S L.J. 81 (1998). The focus of these two important articles is, however, different from that of this Article. Hahn primarily discusses the ways in which feminist insights into the value of experiential accounts of bias and discrimination, as well as into the harms associated with sexual objectification, can

I begin in Part I by providing an overview of liberalism's conception of equality as well as of the feminist and communitarian critiques of liberalism. This exploration of theory is necessary to pave the way for a discussion in Part II of three specific elements (and there may be more) of disability discrimination law that are consistent with feminist theory and communitarian theory. The three elements that I discuss are: (1) the definition of disability, (2) the duty of employers to provide reasonable accommodations to their employees with disabilities, and (3) the obligation of states to transfer eligible individuals with mental disabilities from state institutions to community-based treatment settings.

The definition of disability under disability discrimination law accounts for the relational components of individuals' lives, a matter of central importance to both feminist theory and to communitarian theory.<sup>10</sup> The duty of reasonable accommodation recognizes that difference does not preclude the application of equality principles and that issues of dependency have a role to play in determining the content of those principles.<sup>11</sup> Both of these ideas are found in feminist theory.<sup>12</sup> The law of reasonable accommodation, consistent with feminist theory and communitarian theory, also encourages communication and dialogue between parties in the attainment of equality.<sup>13</sup> Finally, the obligation of states to deinstitutionalize eligible individuals with disabilities recognizes two principles of communitarian theory: first, that participation in community life plays a crucial role in the lives of individuals,<sup>14</sup> and second, that the interests of nonclaimants should be accounted for when determining the rights of claimants.<sup>15</sup>

I end the Article in Part III with a discussion of the practical and political consequences of the differences between disability discrimination law and traditional discrimination law noted in Part II.<sup>16</sup> The issue of difference is a difficult and potentially perilous one for supporters of the ADA because, to the extent that disability discrimination law contains elements that are different from traditional discrimination law, such differences may further contribute to the growing judicial and political backlash against the ADA.<sup>17</sup> I explain in Part III why I do not believe that the differences between disability discrimination law

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help us understand the seldom addressed issue of the asexual objectification of individuals with disabilities. Hahn, *supra*, at 110–41. Silvers, on the other hand, focuses on how feminist theory can benefit from acknowledging and accounting for issues of disability. Silvers, *supra*, at 83–104. Silvers is also critical of grounding disability rights on the identity politics promoted by some feminists. *See id.*

<sup>10</sup> *See infra* notes 115–41 and accompanying text.

<sup>11</sup> *See infra* notes 142–97 and accompanying text.

<sup>12</sup> *See infra* notes 54–80 and accompanying text.

<sup>13</sup> *See infra* notes 198–211 and accompanying text.

<sup>14</sup> *See infra* notes 234–53 and accompanying text.

<sup>15</sup> *See infra* notes 254–95 and accompanying text.

<sup>16</sup> *See infra* notes 296–346 and accompanying text.

<sup>17</sup> *See infra* notes 296–313 and accompanying text

and traditional discrimination law explored in Part II will contribute to that backlash.<sup>18</sup>

Some commentators have argued that accommodation statutes such as the ADA are different from those that prohibit discrimination on the basis of race and sex because the former, in effect, require something more than equality.<sup>19</sup> Other commentators have responded that there are no significant differences between disability discrimination law and traditional discrimination law.<sup>20</sup> I take issue with both sides of this debate. I agree with the first set of commentators that there are important differences between disability discrimination law and traditional discrimination law (though in this Article I explore differences that are different from the ones that they emphasize).<sup>21</sup> I disagree with their suggestion, however, that the differences between the ADA and Title VII mean that the former is a more problematic civil rights statute than the latter.<sup>22</sup>

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<sup>18</sup> See *infra* notes 314–46 and accompanying text.

<sup>19</sup> See Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 314 (2001) (arguing “[w]hat is unique about the ADA is precisely that it is the first employment discrimination law that does not attempt, even as a formal matter, to derive its redistributive objective from the anti-subjugation command. Rather, the concept of discrimination is defined in terms of the failure to redistribute initially.”) (citation omitted); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 840–45 (2001) (distinguishing between “simple” discrimination laws that require similar treatment of the similarly situated and accommodation discrimination laws that require the redistribution of resources); see also Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 593 (2004) (noting that “a received wisdom has developed among academics that providing accommodations raises the disabled above an equal position.”) (extensive citations omitted). The argument is also made that disability discrimination, unlike discrimination on the basis of race and sex, can be a rational response on the part of covered entities to the higher costs represented by requested accommodations. See Issacharoff & Nelson, *supra*, at 315–16; Kelman, *supra*, at 834–37; see also Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001) (concluding that “it would be entirely rational (and therefore constitutional) for a state employer to conserve financial resources by hiring employees who are able to use existing facilities.”).

<sup>20</sup> See Samuel Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 830–70 (2003); Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 898–944 (2004); Stein, *supra* note 19, at 597–636.

<sup>21</sup> I do not in this Article address the debate over whether the ADA is primarily a redistributive statute and, as such, whether it can be distinguished on that ground from Title VII. See sources cited *infra* note 262; see also Anita Silvers, *Formal Justice*, in DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13, 119–26 (1998) [hereinafter PERSPECTIVES] (arguing that the ADA promotes formal rather than redistributive justice); David Wasserman, *Distributive Justice*, in PERSPECTIVES, *supra*, at 149–52 (viewing justice for individuals with disabilities as requiring application of distributive justice principles).

<sup>22</sup> See Issacharoff & Nelson, *supra* note 19, at 308–12; Kelman, *supra* note 19, at 852–55.

I agree with the position taken by the second set of commentators that there is considerable overlap in the equality goals of the ADA and Title VII.<sup>23</sup> Both statutes seek to remove both rational and irrational discrimination from the workplace while providing equal opportunity to historically disenfranchised groups. As I argue throughout this Article, however, I believe that there are significant theory-based differences in *the means* through which the ADA and Title VII seek to provide equality. Although I understand the appeal of wanting to protect the ADA from further criticism and backlash by linking it as tightly as possible to long-recognized antidiscrimination principles codified in statutes such as Title VII, I believe that it is in the best long-term interests of the disability rights movement to acknowledge, explain, and defend the differences that exist between disability discrimination law and traditional discrimination law.<sup>24</sup>

In our society, we tend to view difference with suspicion, especially when discussing what equality means and what it requires.<sup>25</sup> That suspicion applies to differences among individuals<sup>26</sup> as well as to differences in the means through which equality is promoted.<sup>27</sup> We are as a society more comfortable with a unitary vision of equality that seeks to promote equality for all in precisely the same ways. It turns out that the provision of equality is a little more complicated and messier than that. My hope is that this Article will lessen somewhat the skepticism of difference when it comes to the creation and implementation of a legal and policy regime that seeks to provide meaningful equality to individuals with disabilities.

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<sup>23</sup> See Bagenstos, *supra* note 20, at 837–70; Crossley, *supra* note 20, at 898–944; Stein, *supra* note 19, at 597–636.

<sup>24</sup> In a similar vein, I have argued elsewhere that disability rights proponents should acknowledge, explain, and defend the legitimate role that differential or preferential treatment plays in the attainment of the ADA's equality goals. Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 957–95 (2004).

<sup>25</sup> See Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 705–10 (2003).

<sup>26</sup> Under traditional liberal theory, differences between individuals raising equality claims and others undermine or weaken those claims. See *infra* notes 31–41 and accompanying text.

<sup>27</sup> Much of the criticism of affirmative action emanates from the view that differential treatment of any group, no matter how marginalized or oppressed, is always inconsistent with equality. See, e.g., *United Steel Workers v. Weber*, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting) (concluding that “[t]here is perhaps no device more destructive to the notion of equality than the *numerus clausus*—the quota. Whether described as ‘benign discrimination’ or ‘affirmative action,’ the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another.”).

## I. LIBERAL THEORY AND THE FEMINIST AND COMMUNITARIAN ALTERNATIVES

Discrimination law is driven by the principle of equality. There is little consensus among theorists, however, on what equality means, much less on what it requires. Liberal theory, as I explain below, grounds its conception of equality on the shared characteristics or traits between the party making the equality claim and those who are in receipt of the benefit or privilege that is the subject of the claim.<sup>28</sup> Liberal theory also understands individuals to be essentially self-reliant and independent, in little need of others.<sup>29</sup> Feminist theory and communitarian theory, as I also explain below, offer alternative conceptions of equality as well as alternative understandings of individuals.<sup>30</sup>

Liberalism, feminism, and communitarianism have been the subject of a great deal of scholarly writing. It is not possible to provide a complete review of that literature in one article. My goal here is to provide an overview of the three theoretical camps in order to be able to explain in Part II how it is that important elements of disability discrimination law are more consistent with feminist and communitarian theories than they are with liberal theory.

### A. Liberal Theory

A liberal theory of equality begins with the proposition that human beings are more similar than they are different.<sup>31</sup> As liberalism sees it, we are all similar in profound or essential ways.<sup>32</sup> Liberal theory holds that what we share in terms of basic human traits and capacities outweighs our differences in terms of race, sex,

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<sup>28</sup> See *infra* notes 31–38 and accompanying text.

<sup>29</sup> See *infra* notes 39–41 and accompanying text.

<sup>30</sup> See *infra* notes 44–80 (feminism) and notes 81–106 (communitarianism) and accompanying text.

<sup>31</sup> This basic principle has deep historical roots in liberal theory. Thomas Hobbes argued that:

[n]ature hath made men so equal, in the faculties of the body, and mind [so] that . . . when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he.

THOMAS HOBBS, *LEVIATHAN* 98 (First Collier Books ed., 1962) (1651); see also JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 269 (Peter Laslett ed., Cambridge Univ. Press, 1988) (1694)) (describing the state of nature as “a [s]tate also of [e]quality, wherein all the [p]ower and [j]urisdiction is reciprocal, no one having more than another: there being nothing more evident, than that [c]reatures of the same species and rank . . . should also be equal one amongst another without [s]ubordination or [s]ubjection.”).

<sup>32</sup> See Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117, 2124 (1999).

religion, national origin, and so on.<sup>33</sup> The commonalities shared by individuals impose on the state an obligation to treat everyone with equal respect and concern. In fact, it is when the state treats individuals who are similarly situated differently (for example, by making distinctions on the basis of race, sex, or religion) that a liberal understanding of equality is most clearly offended.

Under a liberal theory of equality, the state has an obligation to treat similarly those who are similarly situated.<sup>34</sup> Alternatively, the state is under no obligation to treat equally those who are not similarly situated.<sup>35</sup> For liberal theory, in other words, while similarities require equal treatment, differences can weaken an entitlement to such treatment.<sup>36</sup>

For liberalism, the most important shared capacity of individuals is the ability to reason and to decide for themselves what kind of life plans to pursue.<sup>37</sup> This ability is normatively important because it is through it that we give meaning and direction to our lives. At the same time, we recognize in others the ability to reason and to manage their lives, which leads us to view them as our equals. As political theorist Christine Koggel notes, under a liberal understanding of equality:

[w]e *value* our freedom to plan and manage our life and that gives its protection moral force. Because it matters to us that we have this freedom, we are forced logically to value the freedom of others because we realize that they are like us in also having the requisite capacities and valuing their freedom to exercise these capacities. Further, we are forced logically to move from valuing each person's

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<sup>33</sup> See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 70–86 (2000). I discuss the potential of liberal theory as articulated by Martha Nussbaum, and as informed by the insights of feminist theory, for the recognition by society of lesbian and gay relationships and families in CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* 75–137 (2003).

<sup>34</sup> See West, *supra* note 32, at 2124.

<sup>35</sup> “Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same.” 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.2, at 209 (1999) (citation omitted).

<sup>36</sup> In a legal regime grounded in liberal theory, therefore, equality claimants have the incentive to emphasize similarities and minimize differences. See Ball, *supra* note 25, at 705–07.

<sup>37</sup> For John Locke, the very idea that “man” is a free being “is *grounded* on his having [*r*]eason.” LOCKE, *supra* note 31, at 309. John Stuart Mill considered the ability to reason to be “the source of everything respectable in man either as an intellectual or as a moral being.” JOHN STUART MILL, *ON LIBERTY* 21 (David Spitz ed., W.W. Norton & Co. 1975 (1859)). John Rawls, for his part, argued that persons enjoy two moral powers, both of which are dependent on their ability to reason: a capacity for justice and a capacity to form, revise, and pursue a life plan or a conception of the good. JOHN RAWLS, *POLITICAL LIBERALISM* 19 (1993).



freedom to a commitment to procedural equality—all others like me ought to be treated equally.<sup>38</sup>

Another important aspect of liberal theory for our purposes is its understanding of the individual, or what philosophers call its conception of the self. Liberalism views the self as fully constituted prior to its attachments to others. The most important shared capacities of human beings, in other words, pre-exist relationships with others or membership in groups.<sup>39</sup> Liberal theory therefore views individuals as existing separately and independently from others. For liberalism, a regime of government and laws must protect what it views to be a condition of freedom and autonomy that pre-exists the state. Liberal theory, in other words, has traditionally been most concerned with making sure that, when individuals make the shift (even if it is only conceptual) from a state of nature or a pre-state or pre-community existence to one where rights and obligations are determined through a social contract, their pre-existing independence and autonomy are not compromised.<sup>40</sup> As liberal theory sees it, the ability of individuals to be free is not dependent on others, except in the negative sense that others might interfere with that ability.<sup>41</sup>

The two aspects of liberal theory that are important for our purposes, then, are (1) the crucial role that sameness plays in its vision of equality and (2) its understanding of individuals as equally self-reliant and independent beings. Both of these components of liberal theory have been criticized, in different ways, by feminist and communitarian theorists. It is to an exploration of that criticism that I turn to next.

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<sup>38</sup> CHRISTINE KOGGEL, PERSPECTIVES ON EQUALITY: CONSTRUCTING A RELATIONAL THEORY 48 (1998) (footnote omitted).

<sup>39</sup> As Michael Sandel argues, according to liberal theory, “[w]e are distinct individuals first, and then (circumstances permitting) we form relationships and engage in co-operative arrangements with others.” MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 53 (1982).

<sup>40</sup> As John Locke saw it, when “men” lived in the state of nature prior to the formation of a civil society governed through a state, they did so in “perfect freedom.” LOCKE, *supra* note 31, at 269. A crucial component of Rawls’s famous original position heuristic, through which individuals negotiate over the basic principles of justice, is that individuals engage in the bargaining without knowing anything about themselves or to which communities they belong. See JOHN RAWLS, A THEORY OF JUSTICE 11–15 (1971).

<sup>41</sup> See Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 UCLA L. REV. 599, 644–47 (2000); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 6–8 (1988).

## B. Critiques of Liberal Theory

Feminism and communitarianism offer alternative moral and political views to liberalism.<sup>42</sup> In this section of the Article, I provide an overview of both feminism and communitarianism. The discussion below will proceed in rather broad terms as I discuss feminism and communitarianism, respectively, largely in a unitary fashion. There is, of course, a great deal of diversity of views among feminists and among communitarians (as there is among liberals), which means that the necessarily abbreviated discussion below is somewhat simplified. The goal here, however, is not to explore in great detail the diversity of views within feminist theory and within communitarian theory (though in my discussion of feminism below, I do note some of the basic disagreements among feminists).<sup>43</sup> Instead, the purpose of this section is to provide a broad overview of the feminist and communitarian critiques of liberal theory in order to understand how it is that some important principles of disability discrimination law are more consistent with feminist and communitarian theories than they are with liberal theory.

### 1. *Feminism and Equality*

The liberal vision of equality, namely, that those who are similarly situated should be treated similarly, was embraced by the early women's movement and has played a prominent role in the Supreme Court's approach to sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.<sup>44</sup> While the precepts of liberal equality also received considerable support from feminist legal theorists in the 1970s and early 1980s,<sup>45</sup> most feminist commentators have since expressed skepticism (albeit in different ways)<sup>46</sup> about

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<sup>42</sup> A third important alternative, not discussed here, is postmodernism. For a discussion of postmodernist theory as it applies to issues of disability discrimination, see Melissa Cole, *In/Ensuring Disability*, 77 TUL. L. REV. 839, 842-57 (2003).

<sup>43</sup> See *infra* notes 49-61 and accompanying text.

<sup>44</sup> See Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 33-34 (1999); see also *United States v. Virginia*, 518 U.S. 515, 540-43 (1996) (holding that female candidates for admission to state military school were similarly situated to male candidates and that it was therefore unconstitutional to deny them admission).

<sup>45</sup> See, e.g., Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 15-40 (1975); Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978); Wendy W. Williams, *The Equality Crises: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 192-200 (1982); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 352-70 (1985).

<sup>46</sup> See *infra* notes 49-61 and accompanying text (discussing the differences between dominance and cultural feminists).

the ability of liberalism's vision of equality (usually referred to by feminists as formal equality) to provide women with meaningful equality.

A liberal regime of formal equality seemed best suited to address the explicit differential treatment by the law of women and men. Such differential treatment has become less prevalent, and yet, many feminists argue, patriarchal norms and women's inequality are still pervasive.<sup>47</sup> The growing consensus among feminist legal theorists is that a regime of formal equality that simply seeks to guarantee that the same rules and policies be applied across the board regardless of gender (a regime, in other words, that seeks to *ignore* gender), generally exacerbates rather than mitigates gender-based inequalities and fails to provide meaningful or substantive equality to women.<sup>48</sup>

In response to liberalism's formal vision of equality, some feminists (usually referred to as cultural feminists) have proposed an alternative conception, one that argues that women and men are different in important and relevant ways and that those differences support rather than undermine the application of equality principles.<sup>49</sup> Before I discuss the work of cultural feminists, however, it must be pointed out that other feminists, such as Catharine MacKinnon, have rejected altogether the distinction between a sameness model and a difference model of equality. To emphasize *either* similarities or differences between women and men is to conceal the fact that it is men, under either approach, who inevitably serve as the standard of comparison.<sup>50</sup> According to MacKinnon, women's inequality is

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<sup>47</sup> As Mary Becker puts it, "[d]espite its appeal, formal equality cannot seriously challenge patriarchy. Patriarchy has already adjusted to the requirement of formal equality in most employment contexts and in law. Yet inequality between women and men has not disappeared." Becker, *supra* note 44, at 34 (citation omitted).

<sup>48</sup> See *id.* at 34–35; MARTHA FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 175 (1991); Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 81, 81–82 (Katharine Bartlett & Rosanne Kennedy eds., 1991); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN'S L.J.* 81, 89 (1987); see also MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 26 (1995) (noting that "[n]eutral treatment in a gendered world or within a gendered institution does not operate in a neutral manner.").

<sup>49</sup> See *infra* notes 54–57 and accompanying text.

<sup>50</sup> As MacKinnon puts it:

Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood measured by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule [meant to account for differences] is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.

the result of the subordination of their interests and needs to those of men. Women lack equality, in other words, because they lack power.<sup>51</sup> MacKinnon's brand of feminism, known as dominance feminism, does not see much value in affirming either similarities or differences with men.<sup>52</sup> What it calls for instead is for a reduction in the subordination of women by men, beginning with the way in which heterosexual sexuality, as a construct of male power, oppresses, demeans, and humiliates women.<sup>53</sup>

While dominance feminists such as MacKinnon have rejected the idea of basing equality claims on difference (or for that matter, on sameness) and have instead focused on questions of power, cultural feminists have sought to account for, and, when appropriate, value the differences between women and men.<sup>54</sup> The early work of the developmental psychologist Carol Gilligan has given considerable support to feminists who seek to emphasize differences between women and men. Gilligan, in her studies of the ways in which women address moral dilemmas, noticed that women emphasized notions of responsibility and care much more often than did men, who focused instead on considerations of justice and rights.<sup>55</sup> As Gilligan put it, the moral imperative of many "women is an injunction to care, a responsibility to discern and alleviate the 'real and recognizable trouble' of this world."<sup>56</sup> Gilligan and the many feminists who in the last twenty years have elaborated and built on her work defend a morality grounded in *responsibility* that emphasizes connectedness, compromise, and an ethic of care, rather than a morality grounded in *rights* that emphasizes the individual, separateness, and conflict.<sup>57</sup> A feminist morality, cultural feminists argue, is based on the experiences of women as mothers and caretakers—experiences that have been insufficiently accounted for in liberal theory.

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<sup>51</sup> *Id.* at 40.

<sup>52</sup> *Id.* at 39. "For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness." *Id.*

<sup>53</sup> *See id.* at 5–8.

<sup>54</sup> *See* West, *supra* note 41, at 13–19.

<sup>55</sup> CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 100 (1982).

<sup>56</sup> *Id.* Another book that has been greatly influential in the articulation of a feminist ethic of care is NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984).

<sup>57</sup> The literature in this area is vast. For some representative works, see Annette C. Baier, *The Need for More than Justice*, in *SCIENCE, MORALITY & FEMINIST THEORY* 41 (Marsha Hanen & Kai Nielsen eds., 1987); Owen Flanagan & Kathryn Jackson, *Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited*, 97 *ETHICS* 622, 623 (1987); VIRGINIA HELD, *FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY, AND POLITICS* (1993); SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1989).

Cultural feminists have been criticized by other feminists for essentializing the differences between women and men<sup>58</sup> and for insufficiently accounting for the distinctive voices and interests of lesbians,<sup>59</sup> women of color,<sup>60</sup> and women with disabilities.<sup>61</sup> Although these debates within feminism have been extensive and remain largely unresolved, the important point for our purposes is that cultural feminism provides us with a moral and political framework that accounts for the degree of connectedness, responsibility, and care that has traditionally been an important part of women's lives.

There are undoubtedly risks in emphasizing differences between women and men. On the one hand, the work of Gilligan and others can be seen to present an alternative ethic that speaks more relevantly (than does, for example, liberalism) to women's lives and aspirations. On the other hand, to argue that women are more interested in issues of care and responsibility than are men can reiterate social norms that make women primarily responsible for home life and children and that, therefore, limit their opportunities in political, social, and economic spheres. The important point, however, is this: the failure to account for differences between women and men—differences that are the result of either biological or physical factors (such as the ability of some women to become pregnant and bear children) or of socially constructed norms (such as the idea that women should be primarily responsible for the caring of children)<sup>62</sup> or both—often translates into a failure to treat women equally. A formal type of equality that simply seeks to apply the same rules to women that are applied to men fails to account for the differences between the two and thus fails to provide equal opportunity to women. As Martha Fineman argues, “parity, given different gendered realities, is only possible through different treatment, afforded with attention to the different contexts in which lives are lived.”<sup>63</sup>

An employer, for example, may have a seemingly sex-neutral policy that discourages part-time work. On its face, such a policy does not discriminate on the basis of sex because it applies equally to women and men. As a practical matter, however, the employer's seemingly sex-neutral policy will have a

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<sup>58</sup> See, e.g., Nancy Fraser & Linda J. Nicholson, *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism*, in FEMINISM/POSTMODERNISM 19 (Linda J. Nicholson ed., 1990); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

<sup>59</sup> See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588–90 (1990).

<sup>60</sup> See *id.*; Carol B. Stack, *The Culture of Gender: Women and Men of Color*, in AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES 108 (Mary Jeanne Larrabee ed., 1993).

<sup>61</sup> See Silvers, *supra* note 9, at 82–86.

<sup>62</sup> See Ball, *supra* note 25, at 710–19.

<sup>63</sup> MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 179 (2004).

disparate impact on those who are primarily responsible for the care of children, namely, women. Rather than a formal type of equality that simply seeks to apply the same rules and policies to all while remaining neutral as to their substantive content, many feminists defend a conception of equality that requires a critical assessment of rules and policies to determine whether they in fact provide everyone, including women, with a form of equality that is meaningful and real.<sup>64</sup>

Some feminist theorists also criticize liberalism's atomistic conception of the self, one that views individuals as self-reliant and independent, in little need of others. In particular, these theorists criticize what they take to be liberalism's tendency to overlook the importance of relationships in people's lives. Whether equality exists, these feminists argue, depends largely on the types and dynamics of relationships among individuals. Christine Koggel, for example, proposes a feminist understanding of equality that is relational at its core. At the beginning of her book *Perspectives on Equality: Constructing a Relational Approach*, Koggel points out that relationships underlie the very language of equality because when we say that people are equal, we rely on a relationship "between a standard of comparison and the people . . . identif[ied] as equal."<sup>65</sup> A relational approach to equality, Koggel argues, "asks what moral persons embedded and interacting in relationships of interdependency need to flourish and develop" rather than "limiting itself to an account of what individuals need to flourish as independent autonomous agents."<sup>66</sup>

If we focus on relationships and the embeddedness of individuals, feminist theory tells us, we become more sensitive to the ways in which particular social practices and contexts undermine or support equality. Rather than understanding individuals as self-reliant and independent, a feminist/relational approach to equality focuses on the relationships that individuals are part of and on the social contexts and practices through which those relationships derive their meaning. As Koggel puts it, an emphasis on relationships "moves the focus from what individuals in and by themselves need to flourish to what individuals in relationships and affected by various social practices need to flourish."<sup>67</sup> Koggel adds that:

[a] relational approach provides an account of personhood at odds with accounts in the philosophical tradition that take self-determination to be merely a matter of recognizing and actualizing one's own interests, projects, and goals. A relational conception of the self suggests that we come to know ourselves and others only

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<sup>64</sup> See sources cited *supra* note 48.

<sup>65</sup> KOGGEL, *supra* note 38, at 2.

<sup>66</sup> *Id.* at xi.

<sup>67</sup> *Id.* at 85.

in a network of interactive relationships and that this shapes and is necessary for exercising self-determining capacities.<sup>68</sup>

Koggel also argues that a relational approach to equality has to account for not only the relationships of nurture and care emphasized by cultural feminists, but also for other kinds of relationships, including those characterized by “power, inequality, and oppression.”<sup>69</sup> By understanding how different kinds of relationships, not just those of care, impact the moral personhood of individuals, as well as the social practices that either promote or hinder equality, we can better understand the connection between relationships and equality. This focus on a larger category of relationships allows us to make distinctions between those relationships that are truly conducive to equality and human flourishing and those that are oppressive and that undermine equality.<sup>70</sup>

Feminist theorists have also argued that communication and dialogue are important for the promotion of justice and equality. When individuals of different backgrounds and social positions come together to discuss goals, concerns, and interests, they are better able to identify and address injustices and inequalities. In particular, feminist theorists such as Koggel and Marilyn Friedman have emphasized the importance of promoting forms of dialogue that include the disenfranchised as well as the victims of bias. It is argued that such an inclusion makes it more likely that those who benefit from prevailing social practices and norms will understand the needs and interests of those who do not.<sup>71</sup>

One of the benefits, from a feminist perspective, of fostering dialogue is that it promotes empathy. Without empathy, feminists argue, it would be impossible

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<sup>68</sup> *Id.* at 127–28. “Relationships are inescapable features of our lives. They have an impact on our thoughts and feelings and structure our identities in ways that are unavoidable and imperspicuous. Our identities are structured merely by being members of purposeful and interactive social contexts.” *Id.* at 142.

<sup>69</sup> *Id.* at 148.

<sup>70</sup> See *id.* at 65. While Koggel’s relational feminism focuses primarily on the norm of equality, the work of the relational feminist Marilyn Friedman focuses on the concept of autonomy. See MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* (2003). For a discussion of Friedman’s feminist conception of autonomy, and its role in helping us better understand some of the contemporary demands of the state made by lesbians and gay men, see Carlos A. Ball, *This is Not Your Father’s Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, 28 HARV. WOMEN’S L.J. (forthcoming 2005).

<sup>71</sup> “Biases are best discerned in intersubjective dialogue among persons of different standpoints, including those who are the victims of bias and are therefore likely to be best situated to discern the biases against them in the thinking and practices of others.” MARILYN FRIEDMAN, *WHAT ARE FRIENDS FOR?: FEMINIST PERSPECTIVES ON PERSONAL RELATIONSHIPS AND MORAL THEORY* 3 (1993) quoted in KOGGEL, *supra* note 38, at 103. Koggel adds that “[d]ialogue particularizes inequalities and disadvantages shaped by social practices and in political contexts. The interaction and dialogue of different people differently affected by the dominant discourse makes them evident and concrete.” KOGGEL, *supra* note 38, at 108.

to provide equal respect and concern to all. As Koggel puts it, "[w]e need adequate knowledge of the particularities of different perspectives to be able to think critically about the conditions needed for treating people with equal concern and respect . . . ."<sup>72</sup> It is empathy that allows us to understand how our actions and our omissions, both as individuals and collectively as a society, impact the lives of the disadvantaged. It is also empathy that allows us to see how difference often mandates (rather than precludes) equality. As Mary Becker notes, in discussing the work of Robin West:

An abstract commitment to equality, understood as treating similarly those similarly situated, will do little to help eliminate real social inequalities, since those who are unequal (the rich and the poor, the abled and the disabled, women who are caretakers as well as workers and men who are primarily workers) are not similarly situated. On the other hand, a commitment to help those in need can translate into the obligation of those who are best off to help those in far-different circumstances because of "shared fellow feeling." To the extent such empathy actually exists, there will be a commitment to doing something despite, indeed because of, differences.<sup>73</sup>

In addition to not accounting for issues of empathy in its understanding of equality, liberalism also underestimates the importance and prevalence of dependency in our lives. To the extent that dependency is addressed in liberal theory, it is as a condition to be avoided because it is seen as interfering with self-determination and autonomy.<sup>74</sup> As feminists have been arguing for a long time, however, issues of dependency are not so easily avoided; dependency is much more prevalent in our lives than liberalism is willing to acknowledge. Thus, the feminist philosopher Eva Feder Kittay, for example, questions the notion "of democratic liberal nations as an association of free and independent equals."<sup>75</sup> She notes that "[m]any of us, mostly women, . . . have to attend to the needs of dependents. The notion that we all function, at least ideally, as free and equal citizens is not only belied by empirical reality, it is conceptually not commodious enough to encompass all."<sup>76</sup>

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<sup>72</sup> KOGGEL, *supra* note 38, at 104. Koggel here criticizes Rawls's original position heuristic that calls for the adoption of a neutral and universal perspective that is detached from particular life histories and social practices. See RAWLS, *supra* note 40, at 11–15. What is needed, Koggel argues, is particularity and concreteness in discussions about what justice demands. See KOGGEL, *supra* note 38, at 103–08.

<sup>73</sup> Becker, *supra* note 44, at 43–44 (discussing ROBIN WEST, *CARING FOR JUSTICE* (1997)).

<sup>74</sup> See Ball, *supra* note 41, at 644–47.

<sup>75</sup> EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* 4 (1999).

<sup>76</sup> *Id.*



Feminism reminds us that relationships of dependency are not rarefied or marginal relationships. All of us were part of relationships of dependency as children; many of us are part of them as parents; some of us are part of them as disabled individuals; and some of us are part of them as caretakers to children, the aged, and the disabled. Dependency on others, and the corresponding obligations of care that dependency engenders, therefore, is as much a part of people's lives (especially of women's lives) as is the kind of independence and self-reliance that is exalted by liberal theory. Liberal theory, largely by assuming away relationships of dependency, fails to account for both their importance and prevalence. In addition, when liberal theory ignores relationships of dependency it fails to speak to the needs and interests of most women, since it is women who bear the greatest responsibilities and burdens that accompany caretaking relationships.<sup>77</sup>

For many feminists, therefore, it is impossible to speak meaningfully of equality without acknowledging and addressing questions of dependency. As Kittay points out, given that men have rarely shared the responsibilities of care (for the young, the old, and the disabled), "the equitable distribution of dependency work, both among genders and among classes, has rarely been considered in the discussions of political and social justice that take as their starting point the public lives of men."<sup>78</sup> Kittay adds that "equality will continue to elude us until we take seriously the fact of human dependency and the role of women in tending to dependent persons."<sup>79</sup>

When we account for notions of dependency and care, we begin to understand the limitations of a liberal vision of equality that assumes that relationships between individuals are always symmetrical. In other words, the realities of dependency and obligations of care destabilize the liberal view that, in matters of fundamental importance, individuals are similarly situated, and, as such, stand in a position of reciprocity vis-à-vis one another. To see how this is so, let us think of three hypothetical individuals. *A* is dependent and needs the assistance of another to feed, bathe, and clothe himself. *B* is *A*'s caregiver and assists *A* in all three of those functions. *C* is neither dependent nor a caregiver. The relationship between *A* and *B* is not symmetrical. If *A* is dependent on *B* for feeding, bathing, and clothing, *B* will be in a position of power and control over *A*. *B* has obligations in relation to *A*, including the obligation to treat *A* with respect and concern, despite the fact that the relationship between them is not a

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<sup>77</sup> See FINEMAN, *supra* note 63, at 174 (arguing that the prevalence "of dependency, coupled with the fact that women are the primary caretakers in today's society, means that many women are also dependent. This reality belies the myth that autonomy, understood to be independence and self-sufficiency, is attainable for everyone in society.").

<sup>78</sup> KITTAY, *supra* note 75, at 2.

<sup>79</sup> *Id.* at 4. Martha Fineman makes a similar point when she argues that social institutions must be restructured so that they assume some of the dependency-related burdens that have until now been "borne primarily by women within the family." FINEMAN, *supra* note 63, at 174.

perfectly reciprocal one. Furthermore, to the extent that *B* has to spend time, money, and effort caring for *A*, *B* is placed at a disadvantage when competing with *C* in social, economic, and political spheres. *A* may also be at a disadvantage vis-à-vis *C*; his dependency on others, unless fully compensated for, may limit his ability to participate in social, economic, and political spheres. If social policies do not take into account either *A*'s dependency or *B*'s caretaking obligations (by, for example, supporting and subsidizing *B*'s care of *A*), neither *A* nor *B* will be in a position of meaningful equality in relation to *C*.<sup>80</sup>

As it is hopefully clear from the discussion so far, a feminist understanding of equality is more complex than the liberal understanding that simply looks to see whether parties are similarly situated and that assumes that individuals are (equally) self-reliant and independent. Feminist theory brings into a discussion of equality difficult and challenging issues associated with power, difference, relationships, and dependency. To leave these issues outside of equality discussions, feminist theory holds, gives a misleading and incomplete sense of both what equality means and what it requires. It also serves to leave unchallenged practices and norms that have worked to the disadvantage of traditionally marginalized groups, including women.

## 2. Communitarianism

No debate in Anglo-American political theory has received greater attention in the last two decades than that between liberalism and communitarianism.<sup>81</sup> The part of the debate that is most important to us here is the communitarian criticism of the liberal view that tends to separate, even if only for conceptual or theoretical purposes, individuals from the communities to which they belong.<sup>82</sup> Communitarians criticize the conceptual and political prioritization of the individual over his or her ties with and connections to others. The separation of the individual from the communities to which he or she belongs is problematic for

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<sup>80</sup> See KITTAY, *supra* note 75, at 91, 108–09; see also FINEMAN, *supra* note 63, at 218–62 (arguing that the state and employers should subsidize and support caretakers).

<sup>81</sup> The liberal-communitarian debate has spawned an immense literature. For a representative sample, see COMMUNITARIANISM: A NEW PUBLIC ETHICS (Markate Daly ed., 1994); DEMOCRATIC COMMUNITY: NOMOS XXXV (John W. Chapman & Ian Shapiro eds., 1993); LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984); ELIZABETH FRAZER & NICOLA LACEY, THE POLITICS OF COMMUNITY: A FEMINIST CRITIQUE OF THE LIBERAL-COMMUNITARIAN DEBATE (1993); STEPHEN MULHALL & ADAM SWIFT, LIBERALS & COMMUNITARIANS (1996); NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES (Amitai Etzioni ed., 1995) [hereinafter NEW COMMUNITARIAN THINKING]; THE COMMUNITARIAN CHALLENGE TO LIBERALISM (Ellen Frankel Paul et al. eds., 1996); THE LIBERALISM-COMMUNITARIANISM DEBATE: LIBERTY AND COMMUNITY VALUES (C.F. Delaney ed., 1994) [hereinafter THE LIBERALISM-COMMUNITARIANISM DEBATE].

<sup>82</sup> See *supra* notes 39–41 and accompanying text.

communitarians because, as they see it, individuals *define* themselves through their embeddedness in distinct communities. Communitarians believe that the myriad of communities to which individuals belong—such as families, schools, churches, neighborhoods, and nations—play a crucial role in determining who they are and what they believe is good, valuable, and just.<sup>83</sup> Communitarians argue that individuals have no meaningful identity independent of their ties to others.<sup>84</sup> Instead, ties of friendship, obligation, and loyalty provide individuals with their sense of identity and bind them to the lives and well-being of others. These ties hold communities together and are necessary for the creation of social conditions that promote equality and freedom.<sup>85</sup>

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<sup>83</sup> See, e.g., AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 4–18 (1993); MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 348–51 (1996).

<sup>84</sup> Christopher Lasch argues:

[t]he dispute between communitarians and liberals hinges on opposing conceptions of the self. Where liberals conceive of the self as essentially unencumbered and free to choose among a wide range of alternatives, communitarians insist that the self is situated in and constituted by tradition, membership in a historically rooted community.

Christopher Lasch, *The Communitarian Critique of Liberalism*, in *COMMUNITY IN AMERICA: THE CHALLENGE OF HABITS OF THE HEART* 174–75 (Charles H. Reynolds & Ralph V. Norman eds., 1988); see also Jean Bethke Elshtain, *The Communitarian Individual*, in *NEW COMMUNITARIAN THINKING*, *supra* note 81, arguing that:

[i]n contrast to the standpoint of extreme individualism, with its thin view of the self, the [communitarian] self is 'thick,' more particularly situated, a historical being who acknowledges that he or she has many debts and obligations and that one's history and the history of one's society frame one's own starting point.

*Id.* at 105.

<sup>85</sup> As Mary Ann Glendon notes:

[g]roups are important, not for their own sake, but for their roles in setting the conditions under which individuals can flourish and order their lives together. Because individuals are partly constituted in and through their relationships with others, a liberal politics dedicated to full and free human development cannot afford to ignore the settings that are most conducive to the fulfillment of that ideal. In so doing, liberal politics neglects the conditions for its own maintenance.

MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 137 (1991). The communitarian critique of liberalism "illustrate[s] the consequences for political discourse of assuming situated selves rather than unencumbered selves. [Communitarians] see[] political discourse as proceeding within the common meanings and traditions of a political community, not appealing to a critical standpoint wholly external to those meanings." Michael Sandel, *Introduction*, in *LIBERALISM AND ITS CRITICS*, *supra* note 81, at 10; see also Thomas Moody, *Some Comparisons Between Liberalism and an Eccentric Communitarianism*, in *THE LIBERALISM-COMMUNITARIANISM DEBATE*, *supra* note 81, noting that:

communitarianism sees public life as a constitutive feature of human identity, and thus a necessary part of a good life and valuable for its own sake, not simply as an instrument for

The political theorist Michael Sandel is one of the most prominent contemporary communitarian thinkers. Sandel has formulated a trenchant critique of the atomistic individual—one uncoupled from attachments and communities—in liberal political philosophy. In his book *Liberalism and the Limits of Justice*, Sandel criticizes liberalism—in particular that of John Rawls—for its Kantian view of the self as unencumbered and disconnected from its ends and communities.<sup>86</sup> Sandel argues that “the Rawlsian self is . . . an antecedently individuated subject, standing always at a certain distance from the interests it has.”<sup>87</sup> For Sandel, such a view of the self fails to recognize that our attachments are constitutive of our identity and that our well-being and interests are inescapably linked to those of others. The Rawlsian self, Sandel concludes, “rules out the possibility that common purposes and ends could inspire more or less expansive self-understandings and so define a community in the constitutive sense, a community describing the subject and not just the objects of shared aspirations.”<sup>88</sup> According to Sandel, a theory of political morality is seriously flawed if it does not account for the role that ties among citizens play in establishing and promoting traditional democratic values.<sup>89</sup> For communitarians like Sandel, a vision of individuals inextricably linked to their communities is consistent with the descriptive reality of most people’s lives and is appropriate as an ideal to which a theory of political morality and democracy should aspire.<sup>90</sup>

Given the importance of community as a positive and constructive force in our lives, communitarians are critical of liberalism’s fixed focus on protecting the individual from the community. Although there are undoubtedly some specific communities that are oppressive, community life in some form is essential for the promotion of human flourishing and happiness. As communitarians see it, then, conditions of equality and autonomy are not primarily the result of *protecting* the individual from others and from communities; instead, those conditions are best fostered by *promoting* the ties that bind individuals to others.<sup>91</sup>

In short, for communitarians, the liberal understanding of the relationship between individuals and their communities fails to account for the ways in which the identity, character, and values of individuals are constituted through their embeddedness in distinct communities. To the extent that Americans value equality and freedom, for example, it is the result of their participation in a variety

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purely private ends. Liberalism has few, if any, conceptual tools to describe or justify such a view of the public realm.

*Id.* at 97.

<sup>86</sup> See SANDEL, *supra* note 39.

<sup>87</sup> *Id.* at 62.

<sup>88</sup> *Id.*

<sup>89</sup> See SANDEL, *supra* note 83, at 317–51.

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

of communities that have promoted those values and transmitted them from one generation to the next, to the point that they have become inseparable from the identity and character of American citizens. If we are concerned with the promotion of equality and freedom, therefore, we need to recognize and foster the bonds between citizens and their communities.<sup>92</sup>

There is another aspect of communitarian theory, related to the discussion so far, that needs to be mentioned briefly: communitarians are critical of the way in which liberalism promotes individual rights, often at the expense of the public good. This is not to say that communitarians reject the notion of individual rights; they generally do not.<sup>93</sup> For communitarians, however, individual rights, as they have been understood and implemented in the United States, too often trump other considerations such as the responsibilities that individuals owe to others as well as what is best for the general welfare.<sup>94</sup> Communitarians argue that a discourse on justice and equality that is focused primarily on individual rights often overlooks the obligations of individuals toward others and ignores legitimate community interests.<sup>95</sup> Thus, communitarian thinkers such as Mary Ann Glendon urge us to eschew the liberal talk of individual rights in absolutist or categorical terms in favor of a more nuanced discourse that places the enforcement of individual rights in a broader context that accounts for the obligations of individuals toward others and for the vitality and well-being of communities.<sup>96</sup>

Communitarian theory, like feminist theory, emphasizes the importance of participation, dialogue, and communication.<sup>97</sup> Part of the limitations that inhere in the kind of individualism promoted by liberalism, communitarians argue, is that it ends up alienating individuals from each other. If everyone is pursuing his or her own interests or claims separately with little regard for the impact on others, there is little opportunity or incentive for individuals to come together and discuss

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<sup>92</sup> "The myriad associations that generate social norms are the invisible supports of, and the *sine qua non* for, a regime in which individuals have rights. . . . When individual rights are permitted to undermine the communities that are the sources of such practices, they thus destroy their own surest underpinning." GLENDON, *supra* note 85, at 137–38; see also AMITAI ETZIONI, *THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY* 25 (1996) (arguing that "if individuals are . . . deprived of the stable and positive affective attachments communities best provide, they exhibit very few of the attributes commonly associated with the notion of a freestanding person presumed by the individualist paradigm.").

<sup>93</sup> See Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445, 454 (1987) (noting that "[a] communitarian morality is not rights-centered, but it is not opposed to rights or indifferent to them or casual about them."); see also GLENDON, *supra* note 85, at xii (calling "not [for] the abandonment, but the renewal, of our strong rights tradition").

<sup>94</sup> See ETZIONI, *supra* note 83, at 1–14.

<sup>95</sup> See *id.*; GLENDON, *supra* note 85, at x–xii.

<sup>96</sup> See GLENDON, *supra* note 85, at 18–46.

<sup>97</sup> See ETZIONI, *supra* note 83, at 102–17.

shared interests and goals. As Glendon puts it, the "tendency to frame nearly every social controversy in terms of a clash of rights . . . impedes compromise, mutual understanding, and the discovery of common ground."<sup>98</sup> Communitarians urge a greater involvement in civic participation and dialogue in order to encourage individuals to come together to share ideas, learn from each other, and work together to solve problems.<sup>99</sup>

There is much to communitarian theory that is reflected in feminist theory and vice-versa. Both are critical of the liberal conception of the self that views individuals as self-reliant, independent, and in little need of others.<sup>100</sup> Both feminists and communitarians also emphasize the importance of communication and compromise over the "one winner takes all" approach of liberal individual rights.<sup>101</sup> Finally, both call for the inclusion of norms of responsibility and obligation in discussions of justice and equality.<sup>102</sup>

It must be noted, however, that there are important differences and disagreements between feminists and communitarians. Although both are skeptical of liberalism's individualism and both stress the importance of ties and connections to others, the kinds of relationships that each side emphasizes are different. Feminists (especially, as we have seen, cultural feminists) emphasize intimate and familial relationships that raise issues of care and dependence.<sup>103</sup> Communitarians have had little to say about caring and dependent relationships and have instead focused on ties and connections between individuals and nonintimate others in communities such as schools, neighborhoods, religions, unions, political organizations, and so on.<sup>104</sup> In fact, some feminists have criticized communitarians (as they have liberals) for not paying sufficient attention to relationships within the family and how gender-based inequalities in those relationships limit the opportunities of women outside of the family.<sup>105</sup> Feminists have also criticized communitarians for their exaltation of certain communities that they take to be the seedbeds of civic virtue (such as family, neighborhoods, and religious congregations) without addressing the inegalitarian

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<sup>98</sup> GLENDON, *supra* note 85, at xi.

<sup>99</sup> See ETZIONI, *supra* note 83, at 102-17; GLENDON, *supra* note 85, at 171-83; SANDEL, *supra* note 83, at 317-51.

<sup>100</sup> See *supra* notes 65-80 (feminism) and 81-92 (communitarianism) and accompanying texts.

<sup>101</sup> See *supra* notes 71-73 (feminism) and 93-99 (communitarianism) and accompanying texts.

<sup>102</sup> See *supra* notes 55-57 (feminism) and 93-99 (communitarianism) and accompanying texts.

<sup>103</sup> See *supra* notes 56-64, 74-80 and accompanying texts.

<sup>104</sup> An exception is the communitarian philosopher Alasdair MacIntyre who has written on issues of dependency. See ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* (1999).

<sup>105</sup> See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 114 (1989).

and oppressive values and norms that are sometimes promoted and enforced by those very same communities.<sup>106</sup>

Now that we have a general understanding of liberal theory's normative vision, as well as that of the feminist and communitarian alternatives, we can proceed, as I do in the next part of the Article, to explain how it is that important elements of disability discrimination law are more consistent with feminist and communitarian theory than they are with liberal theory.

## II. FEMINIST AND COMMUNITARIAN ELEMENTS OF DISABILITY DISCRIMINATION LAW

It is the thesis of this Article that disability discrimination law, to a much greater extent than traditional discrimination law (by which I mean discrimination protection on the basis of race and sex), contains elements that are consistent with feminist and communitarian theory. I will explain in this part of the Article why this is so. Before I do so, however, I want to make it clear that the distinction between disability discrimination law and traditional discrimination law does not track perfectly the distinction between feminist theory and communitarian theory

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<sup>106</sup> Marilyn Friedman notes that:

[c]ommunitarians invoke a model of community that is focused particularly on families, neighborhoods, and nations. These sorts of communities have harbored numerous social roles and structures that lead to the subordination of women, as much recent research has shown. Communitarians, however, seem oblivious to those difficulties and manifest a troubling complacency about the moral authority claimed or presupposed by those communities in regard to their members. By building on uncritical references to those sorts of communities, communitarian philosophy can lead in directions feminists should not wish to follow.

Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in FEMINISM AND COMMUNITY 188 (Penny A. Weiss & Marilyn Friedman eds., 1995); see also FRAZER & LACEY, *supra* note 81, at 140 (arguing that "[t]he mere switch of focus from individual to collective values and public goods does not guarantee progress towards the ending of women's subordination.").

Christine Koggel distinguishes her relational approach to equality, see *supra* notes 65–72 and accompanying text, from communitarianism as follows:

Communitarian claims that self-knowledge and agency consist in discovering and living an identity set by a community ignore the facts of actual communities structured by oppressive power relations and dominated by particular groups. The identities to be discovered and lived by members of some groups are roles created and defined by those with the power to name difference and to circumscribe and limit the activities of those so labeled. This is why the focus needs to be on relationships and not on either individuals or communities as such. An examination of relationships can reveal the norms that result in exclusionary social practices and the perspectives of those who are ignored and detrimentally affected by communal norms and practices.

KOGGEL, *supra* note 38, at 138.

on the one hand and liberal theory on the other. Traditional discrimination law has much in common with liberal theory because it generally relies on notions of sameness to ground equality claims. Under Title VII of the Civil Rights Act of 1964, for example, employers are required to treat minority and female employees in the same way that they treat other employees.<sup>107</sup> Title VII, in other words, usually operates under the assumption that group membership is largely irrelevant for purposes of employment decisions.<sup>108</sup>

Similarly, there are some aspects of disability discrimination law that are consistent with the individualism of liberal theory. Courts have made it clear, for example, that the determination of whether an individual, under the ADA, is disabled,<sup>109</sup> qualified for the position in question,<sup>110</sup> or a direct threat to the health

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<sup>107</sup> See *infra* notes 142–44 and accompanying text.

<sup>108</sup> There are exceptions to this general rule, including the bona fide occupational qualification (“BFOQ”) doctrine, affirmative action cases, and disparate impact claims. Under the BFOQ doctrine, qualifications related to sex, national origin, and religion (but not race) that an employer can show are necessary requirements for a particular job are exempt from Title VII’s prohibition against discrimination. 42 U.S.C. § 2000e-2(e) (2000).

Title VII allows a court to order affirmative action in hiring and promotion in order to remedy past discrimination. 42 U.S.C. § 2000e-5(g) (2000). In such cases, if there is a history of pervasive discrimination, all that is required is that the plaintiffs be members of the group that was discriminated against in the past; it is not necessary that they themselves have been the subjects of discrimination. See *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986); *Local 28, Sheet Metal Workers Int’l Ass’n v. EEOC*, 478 U.S. 421, 446–47 (1986) (plurality opinion).

In disparate impact claims, plaintiffs allege that a practice by the employer that is neutral on its face disproportionately and adversely affects the protected *group* to which the plaintiffs belong. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971). Disparate impact claims call for an assessment of the effect of the employer’s practice on a class as a whole. In such cases, therefore, the focus shifts from the unique circumstances of the individual claimants to whether the protected class as a group is adversely affected by the employer’s policy.

In employment discrimination cases involving disability, disparate impact claims in which plaintiffs rely on the negative class-wide effects of neutral practices are relatively rare. As Pamela Karlan and George Rutherglen point out:

[a]lthough the ADA adopts the theory of disparate impact in almost the same terms in which it is now codified under Title VII, the ADA has not preserved the central function of the theory as a means of recovery through class actions. Litigation under the ADA instead responds to the complexities in the inherently unique circumstances of many disabled individuals.

Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 19 (1996); see also Silvers, *supra* note 9, at 114 (arguing that “[b]ecause physical or mental impairment can bar an individual from selecting the most common or popular mode for demonstrating her talents, ensuring that people with disabilities have fair opportunity to display their talents compels disability discrimination law to be inherently individualistic.”).

<sup>109</sup> See, e.g., *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198–99 (2002); *Sutton v. United Airlines*, 527 U.S. 471, 483 (1999); see also 29 C.F.R. pt. 1630 app.



or safety of others,<sup>111</sup> requires an assessment that is particular to the individual in the case. Furthermore, given that there are many types of disabilities, varying in severity, that manifest themselves in diverse ways in different individuals, the reasonable accommodation that is most appropriate in any given case will also frequently depend on the individual involved.<sup>112</sup>

The ADA also seeks to increase the independence and self-sufficiency of individuals with disabilities. As the statute states, "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."<sup>113</sup> Notions of independence and self-sufficiency, as we have seen, are of central importance to liberal theory.<sup>114</sup>

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§ 1630.2(j) (2001) (noting that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis.").

With the exception of disparate impact cases (in which group membership under Title VII matters, see *supra* note 108), "[a] Title VII plaintiff . . . does not normally need to prove membership in any particular class to pursue a discrimination claim." Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575, 579 (2002). The courts, for example, have interpreted Title VII to protect white as well as black employees, see *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–87 (1976); religious employees as well as atheists, see *Young v. S.W. Sav. & Loan Ass'n*, 509 F.2d 140, 144–45 (5th Cir. 1975); and male as well as female employees, see *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1340–41 (D.C. Cir. 1973). Disability discrimination law, on the other hand, generally requires group membership as a threshold issue: only those who are disabled can sue for discrimination. 42 U.S.C. § 12112(a) (2000); 42 U.S.C. § 12132 (2000); 42 U.S.C. § 12182(a) (2000). There are two exceptions to this general rule: (1) the ADA explicitly allows those who associate with individuals with disabilities to bring a discrimination claim based solely on that association, 42 U.S.C. § 12112(b)(4) (2000), and (2) some courts have allowed nondisabled individuals to sue under the ADA's provision that limits the ability of employers to conduct medical inquiries and examinations, see, e.g., *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 592 (10th Cir. 1998). Despite the fact that group membership is generally required in order for a plaintiff to have standing to sue under the ADA, the point that I want to emphasize is that the analysis called for in determining whether the plaintiff is a member of the protected class is very much an individualized one that takes into account the plaintiff's particular circumstances.

<sup>110</sup> See, e.g., *Weigel v. Target Stores*, 122 F.3d 461, 466 (7th Cir. 1997).

<sup>111</sup> See, e.g., *Kapche v. City of San Antonio*, 304 F.3d 493, 494 (5th Cir. 2002); see also 29 C.F.R. pt. 1630 app. § 1630.2(r) (2001) (noting that "[d]etermining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis.").

<sup>112</sup> See *Karlan & Rutherglen*, *supra* note 108, at 15. Furthermore, the workplace needs and expectations vary from employer to employer, further supporting a policy of a case-by-case analysis and not broad generalizations in reasonable accommodation cases. See *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 652 (1st Cir. 2000) (O'Toole, J., dissenting) (noting that the term "[r]easonable accommodation" is . . . a capacious term, purposefully broad so as to permit appropriate case-by-case flexibility.").

<sup>113</sup> 42 U.S.C. § 12101(a)(8) (2000). The statute also seeks to reduce the dependency of individuals with disabilities on the government. See 42 U.S.C. § 12101(a)(9) (2000) (noting that

That some elements of disability discrimination law in the United States are consistent with liberal theory is hardly surprising. What is surprising (and intriguing) is the extent to which other elements of disability discrimination law are more consistent with feminist theory or communitarian theory, or both, and are, as such, in some tension with liberal theory. In this part of the Article, I discuss the following three such elements: the definition of disability, the obligation of employers to provide reasonable accommodations to employees with disabilities, and the obligation of states to deinstitutionalize individuals with mental disabilities who are eligible to receive treatment and services in community-based settings.

### A. Definition of Disability

As many commentators have noted, in the last few decades there has been a shift in the United States away from a medical model of disability and toward a social model.<sup>115</sup> The focus under the medical model is exclusively on the limitations imposed on the individual by physical or mental impairments as diagnosed and explained by health care professionals.<sup>116</sup> Under a medical model of disability, then, the focus is entirely on the individual and her impairment; there is little interest in the ways in which the individual's relationships with others, as well as the physical environment, affect, exacerbate, or mitigate the impairment. The emphasis is on the abilities and limitations of the individual, independent of factors that are apart from her body and mind, such as her relationships and environment.

In contrast, under a social model of disability, it is the relationships between an individual and others, as well as those between an individual and the environment, that determine whether she is disabled.<sup>117</sup> The model, in other words, situates or embeds the individual in particular (and by definition variable)

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the discrimination and prejudice against individuals with disabilities "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."). The fact that the ADA has the dual purpose of providing for equal opportunity while lessening the dependence of individuals on government may explain why it was supported by both liberal and conservative legislators. See Sara D. Watson, *A Study in Legislative Strategy*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 25, 29–30 (Lawrence O. Gostin & Henry A. Beyers eds., 1993).

<sup>114</sup> See *supra* notes 39–41 and accompanying text.

<sup>115</sup> See, e.g., Eichhorn, *supra* note 109, at 595–96; Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 626–27 (1999); Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1, 6 (1999).

<sup>116</sup> See Crossley, *supra* note 115, at 653–54; Silvers, *supra* note 21 at 74–76.

<sup>117</sup> See Crossley, *supra* note 115, at 653–59; Elizabeth A. Pendo, *Disability, Doctors, and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. 1176, 1193 (2002).

social contexts and it is those contexts that ultimately determine whether she is disabled. The social model views disability as a "social construct rather than a physiological phenomenon."<sup>118</sup>

An example commonly used to illustrate the way in which the social model operates is that of a person who, because of a physical impairment, cannot use her legs to walk and must therefore rely on a wheelchair.<sup>119</sup> A wheelchair user who (1) lives in a physical environment that is constructed in a way that takes her needs into account (for example, one that includes the availability of ramps, elevators, and wide doors) and (2) interacts with others who do not treat her differently because she uses a wheelchair, is not disabled under the social model despite the physical impairment. On the other hand, if the very same person with the very same physical impairment regularly faces tangible barriers (e.g., sets of stairs) or intangible obstacles (e.g., differential treatment based on pity or fear), she will, under the social model, be deemed to be disabled.

The view of disability as a social construct has become quite pervasive in the legal academic literature.<sup>120</sup> At the same time, the medical model has been the subject of much criticism for fostering dependency by individuals with disabilities on medical professionals; for stigmatizing individuals with disabilities by deeming them abnormal or deficient; and, perhaps most importantly, for failing to recognize the role that social practices play in determining who is disabled.<sup>121</sup>

The social model of disability is reflected in the ADA's definition of disability. Under that definition, an individual who has an actual disability, a record of a disability, or is perceived as having a disability, is deemed disabled, and as a result qualifies for legal protection from discrimination.<sup>122</sup> In order to show an actual disability, a plaintiff must have a physical or mental impairment.<sup>123</sup> Having an impairment, however, is a necessary but not sufficient requirement for there to be a legal finding of actual disability. The plaintiff must also establish that the impairment substantially limits a major life activity.<sup>124</sup> It is this second component of the statutory standard that moves away from an exclusive focus on the individual's physical or mental impairment and toward an

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<sup>118</sup> Hahn, *supra* note 9, at 98.

<sup>119</sup> See Crossley, *supra* note 115, at 654 (noting that the wheelchair example is a "straightforward (and probably the most often used) example of how the construction of physical environments can create disability.") (emphasis added).

<sup>120</sup> See, e.g., Melissa Cole, *The Mitigation Expectation and the Sutton Court's Closeting of Disabilities*, 43 HOW. L.J. 499, 502-18 (2000); Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 S. CAL. L. REV. 399, 434 (2001); Eichhorn, *supra* note 109, at 598-99.

<sup>121</sup> For a summary of the criticism of the medical model, see Eichhorn, *supra* note 109, at 596-99.

<sup>122</sup> 42 U.S.C. § 12102(2) (2000).

<sup>123</sup> 42 U.S.C. § 12102(2)(A) (2000).

<sup>124</sup> *Id.*

assessment of how the impairment impacts her ability to carry out "those activities that are of central importance to daily life."<sup>125</sup> It is at this point that relationships with others, as well as the physical environment in which the person lives, can become crucial to the analysis.

The EEOC in its regulations defines the phrase "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>126</sup> Some of these activities, such as seeing, hearing, and breathing, are for the most part internal to the individual (although obviously there are devices, such as hearing aids and eye glasses, that can assist the individual in performing them).<sup>127</sup> But the successful carrying out of other activities included in the list, such as learning and working, will often depend on the actions of others (e.g., is the teacher or employer willing to make the necessary changes in policies and procedures that would make it possible for the impaired person to learn or work?) and on the physical environment (e.g., is the classroom or workplace accessible to individuals with physical impairments?).

The list of major life activities provided by the EEOC is non-exclusive. In interpreting the statute, courts have added to the list activities such as interactions with others,<sup>128</sup> reproduction,<sup>129</sup> and sexual relations.<sup>130</sup> These activities are also consistent with the social model of disability because they focus not just on the "internal" limitations imposed by physical or mental impairments, but also on the individual's relationships with others.

Under the third prong of the statutory definition of disability, which deems as disabled those who are regarded by others as disabled,<sup>131</sup> the focus is even more explicitly on the relationships between the individual in question and others. Under the third prong, whether an individual has a physical or mental impairment plays a relatively minor role, and sometimes no role at all, in the determination of

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<sup>125</sup> *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

<sup>126</sup> 29 C.F.R. § 1630.2(i) (2001). The Department of Justice, in its regulations to Titles II and III of the ADA, defines "major life activities" in the same way. 28 C.F.R. § 35.104 (2001); 28 C.F.R. § 36.104 (2001).

<sup>127</sup> The Supreme Court has held that, in determining whether plaintiffs are disabled within the meaning of the ADA, courts must take into account their use of devices that mitigate the limitations imposed by the physical or mental impairments. *See Sutton v. United Airlines*, 527 U.S. 471, 482 (1999).

<sup>128</sup> *See McAlinden v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999); *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 160 (E.D.N.Y. 2002). *But see Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (suggesting that "ability to get along with others" is not a major life activity).

<sup>129</sup> *See Bragdon v. Abbott*, 524 U.S. 624, 641 (1998).

<sup>130</sup> *See McAlinden*, 192 F.3d at 1234.

<sup>131</sup> 42 U.S.C. § 12102(2)(C) (2000).

whether she is disabled.<sup>132</sup> The ways in which others perceive the individual, including the ways in which they interact with and treat her, determine whether she is disabled within the meaning of the ADA.<sup>133</sup> As with the actual disability prong of the statutory definition, what is crucial under the third prong is not the physical or mental impairment itself, but the ways in which the impairment (whether real or perceived) affects the ability of the individual to lead her daily life within the context of particular relationships and physical environments. As the Supreme Court has noted, Congress, in enacting the “regarded as” prong of the statutory definition, “acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”<sup>134</sup>

The medical model of disability is consistent with liberal theory. The model, like the theory, focuses on the individual, viewing her largely in isolation, separate and distinct from her ties and connections to others.<sup>135</sup> On the other hand, the social model of disability, as well as the legal definition of disability under the ADA, has more in common with feminist and communitarian theory. As we have seen, the relational theory of equality proffered by the feminist theorist Christine Koggel, for example, focuses not on individuals as independent agents, disconnected from others, but on the particular relationships and social contexts through which they lead their lives.<sup>136</sup> A relational theory of equality rejects abstract considerations and principles, such as those promoted by formal equality’s maxim that those who are similarly situated should be treated similarly, and instead asks whether particular and concrete relationships support or hinder the attainment of meaningful equality.<sup>137</sup>

Similarly, communitarian theory, as we have also seen, criticizes the liberal prioritization of the individual over her ties with and connections to others.<sup>138</sup> For

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<sup>132</sup> According to the EEOC, there are three ways in which a plaintiff may show that she was regarded by the employer as disabled, namely, that she:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such an impairment; or
- (3) Has [no physical or mental impairments as defined by the regulations] . . . but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(f) (2001). Note how plaintiffs in the third category do not need to have a physical or mental impairment in order to be deemed disabled under the ADA.

<sup>133</sup> See, e.g., *Henderson v. Ardco, Inc.*, 247 F.3d 645, 650–53 (6th Cir. 2001); *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227–28 (9th Cir. 2001).

<sup>134</sup> *Sch. Bd v. Arline*, 480 U.S. 273, 284 (1987).

<sup>135</sup> See *supra* notes 39–41 and accompanying text.

<sup>136</sup> See *supra* notes 65–72 and accompanying text.

<sup>137</sup> See *supra* notes 65–80 and accompanying text.

<sup>138</sup> See *supra* notes 81–92 and accompanying text.

the communitarian it makes no sense to think of individuals as existing prior to or separate from the communities to which they belong. Instead, communitarianism holds that individuals are constituted largely through their ties and relationships with others.<sup>139</sup>

Both feminist theory and communitarian theory, then, encourage us to move past an exclusive focus on the individual and toward a focus on the *relationships* between the individual and others. This is precisely what the social model of disability requires. Rather than viewing disability as an internal or intrinsic condition that is determined by individual characteristics or traits, it views the condition (or status) of disability as arising from the *interaction* of physical or mental impairments (the internal factors) with particular and varying relationships and environments (the external factors) that are part of an individual's daily life.<sup>140</sup> Under the social model of disability, if we separate the individual from her relationships with others it becomes impossible to determine whether she is in fact disabled.

As we have seen, the statutory definition of disability under the ADA does not assess the functional limitations of individuals by analytically separating them from others; instead, it focuses on relationships among individuals and between individuals and their environments.<sup>141</sup> An atomistic focus on individuals as existing apart from their relationships and environments provides a poor foundation for a legal and policy regime that seeks to promote equality for individuals with disabilities. An exclusive focus on the individual, and on her physical and mental impairments, fails to recognize the role that relationships and the environment play in the determination of disability. By encouraging us to move beyond an exclusive focus on the individual, feminist theory and communitarian theory lead us to grapple with the social contexts that often

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<sup>139</sup> See *supra* notes 81–92 and accompanying text.

<sup>140</sup> It is also possible to understand a capacity for autonomy as being dependent on both internal and external factors. See Ball, *supra* note 41, at 644–47. Liberal theory is not blind to the fact that external factors can affect the autonomy of individuals, but it views those factors primarily in a negative sense. See *id.* Liberal theory, in other words, has primarily concerned itself with negative rights and with protecting individuals from interference by others and by the state. But the promotion of autonomy is not only about protecting individuals' rights to noninterference; it is also about the establishment of social conditions that permit individuals to exercise their internal capacities for autonomy. See *id.*; see also Ball, *supra* note 70. In determining whether someone has the opportunity to lead an autonomous life, as in determining whether someone is disabled, it is necessary to assess whether social conditions exist that are conducive to the leading of a full human life, or as the ADA puts it, to the carrying out of "major life activities." 42 U.S.C. § 12102(2)(A) (2000). For a fascinating look at how the statutory phrase "major life activities" can be better understood with the aid of philosophy, see Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 1007–25 (2004).

<sup>141</sup> See *supra* notes 124–37 and accompanying text.

determine whether particular physical or mental impairments translate into disabilities.

Given the frailties of the human body and mind, we will never be able, through social policies alone, to compensate for all of the constraints imposed by physical and mental impairments. But if we understand disability as determined primarily through relationships and the environment, we will be better able to address and remedy those barriers, both tangible and intangible, that account for most of the limitations in the lives of individuals with disabilities.

The individualism of liberal theory fails to account for the ways in which we increasingly understand disability as a social matter and define it as a legal matter. Feminist theory and communitarian theory are better able to account for the importance of relationships and social contexts in determining the threshold question in disability discrimination law, namely, whether the person who is claiming a legal right to equality is disabled.

## B. *Reasonable Accommodation*

Whether the plaintiff is disabled is only the first question to be asked in a disability discrimination case. If we answer that question in the affirmative, we then proceed to the second question of whether the equality principles codified in disability discrimination law have been violated. In the employment context, the answer to this second question almost always depends on whether the employer provided a reasonable accommodation to a qualified employee with a disability. (I will limit my discussion in this section to the employment context.) There are at least three elements of an employer's obligation to reasonably accommodate employees with disabilities that are consistent with feminist theory or communitarian theory, or both. Reasonable accommodation law in the disability context (1) calls for the differential treatment of the protected individual as a way of guaranteeing equal opportunity, (2) accounts for issues of dependency in the pursuit of equality goals, and (3) encourages communication and compromise between the parties. I discuss all three elements below.

### 1. *Reasonable Accommodation as Differential Treatment*

In an important law review article published several years ago, Pamela Karlan and George Rutherglen noted that the employment provisions of the ADA contain two different kinds of prohibitions against discrimination.<sup>142</sup> The first kind, modeled largely on Title VII, seeks to prevent employers from making decisions affecting employees with disabilities that are based on stereotypes, myths, and misinformed judgments about their abilities to perform the job.<sup>143</sup> In

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<sup>142</sup> Karlan & Rutherglen, *supra* note 108, at 5.

<sup>143</sup> *Id.*

other words, under this first set of constraints on the discretion of employers, the ADA requires job providers to ignore disability in the same way that Title VII requires them to disregard the race, sex, religion, and national origin of employees.<sup>144</sup> Under this type of discrimination prohibition, the law simply requires employers to treat individuals with disabilities in the same way that they treat other employees.

This first kind of prohibition against discrimination contained in the ADA is entirely consistent with a liberal vision of equality that imposes on defendants an obligation to treat similarly those who are similarly situated.<sup>145</sup> As applied to some individuals with disabilities in some employment contexts, this sameness model of equality requires that employers consider the disabilities in question as irrelevant to the ability of the disabled employees to perform their jobs, in the same way that Title VII requires them to deem irrelevant the race and sex of their employees. If a particular disability is indeed irrelevant for purposes of performing a particular job, then the individual with that disability is similarly situated vis-à-vis other employees and is legally entitled to be treated by the employer in the same way.<sup>146</sup>

The application of a sameness model of equality, however, is not enough to guarantee equality to all individuals with disabilities because sometimes those disabilities, given particular employment contexts and requirements, can negatively affect job performance unless they are accommodated. The second type of discrimination prohibited by disability discrimination law, therefore, consists of the refusal by an employer to reasonably accommodate the disability of an employee.<sup>147</sup> In cases where an employee with a disability asks to be accommodated, the employer may be legally required to (1) take the disability into account (as opposed to deeming it irrelevant) in accommodating the employee and, as such, (2) treat the disabled employee differently from able-bodied employees (and differently from other disabled employees with different disabilities) in the same workplace. The legal requirement to accommodate individuals with disabilities, then, embraces a difference (as opposed to a sameness) model of equality, one that calls for differential treatment in order to provide those individuals with meaningful equality of opportunity.<sup>148</sup>

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 10.

<sup>146</sup> *Id.*

<sup>147</sup> 42 U.S.C. § 12112(b)(5)(A) (2000); *see also* Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019, 1021–22 (7th Cir. 1997) (noting that “the ADA encompasses two distinct types of discrimination. . . . [Namely] treating ‘a qualified individual with a disability’ differently because of the disability, i.e., disparate treatment. . . . [and] failing to provide a reasonable accommodation.”) (internal citations omitted).

<sup>148</sup> Karlan & Rutherglen, *supra* note 108, at 10–11.



As Karlan and Rutherglen (among others)<sup>149</sup> have noted, then, the obligation to reasonably accommodate under disability discrimination law requires that employees with disabilities (for whom accommodations are appropriate) be treated differently from other employees.<sup>150</sup> The most important principle of disability discrimination law, in other words, operates under a difference model of equality, one that acknowledges that differential treatment of disabled individuals is often necessary in order to provide them with equal opportunity in the workplace. Under this model, to treat disabled employees in the same way as able-bodied employees interferes with, rather than promotes, equal opportunity.<sup>151</sup>

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<sup>149</sup> E.g., Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 40 (2000) (arguing that “the ADA[ ] reli[es] on a vision of equality that is particularly controversial—the principle that differential treatment, rather than the same treatment, is necessary to create equality.”); Eichhorn, *supra* note 109, at 579 (noting that “where under Title VII, equality requires similar treatment *despite* differences of race, sex, national origin, and religion, under the ADA it sometimes requires *different* treatment *because of* disability.”); Linda Hamilton Krieger, *Foreword: Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 3–4 (2000):

The ADA incorporated a profoundly different model of equality from that associated with traditional non-discrimination statutes like Title VII. . . . The ADA required not only that disabled individuals be treated no worse than non-disabled individuals with whom they were similarly situated, but also directed that in certain contexts they be treated differently, arguably better, to achieve an equal effect.

*Id.* Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 344 (2001) (noting that “[i]n recognition of the fact that equal treatment does not lead to inclusion in the mainstream for many people with disabilities, . . . the ADA requires *different* treatment for people with disabilities.”).

<sup>150</sup> See *supra* notes 142–48 and accompanying text.

<sup>151</sup> See ROBERT L. BURGDORF, JR., *DISABILITY DISCRIMINATION IN EMPLOYMENT LAW* 274 (1995) (arguing that “where people’s disabilities *do* situate them differently regarding employment opportunities, identical treatment may be a source of discrimination and different treatment may be required to eliminate it.”). Bonnie Poitras Tucker explains that “in most cases treating people with disabilities in the same manner as people without disabilities serves to exclude people with disabilities from mainstream society, rather than to include them in mainstream society.” Tucker, *supra* note 149, at 344. Tucker then adds several examples from her experience as a deaf person:

If I am permitted to enroll in a regular school program alongside hearing peers but am not provided with “different” treatment to assist me in understanding what is said in the classroom, I am excluded from, rather than included in, the educational system. If I am given the same opportunities as my hearing peers to attend a movie, have a telephone and make and receive calls, attend a lecture or play, watch a television show, participate in or observe a court proceeding, but am not provided with “different” treatment to assist me in hearing what is said on the phone or television or at the play, movie or court proceeding, I am excluded from, rather than included in, those activities. Simple equal treatment does

Under a liberal theory of equality, discrimination law becomes applicable when those who are similarly situated are treated differently. Under the prescriptions of a statute such as the ADA, antidiscrimination principles become applicable *because* individuals are not similarly situated. It is the differences between employees with disabilities and those without that impose equality-based obligations on employers (through the doctrine of reasonable accommodation) that make it possible for the former to have an equal opportunity to compete.<sup>152</sup>

It may be argued that disability discrimination law is not so different from traditional discrimination law because it aims to create the necessary conditions that will make it possible for individuals with disabilities to be similarly situated to others in the sense that they are able, through reasonable accommodations, to compete with able-bodied individuals. What is important for our purposes, however, is to understand that disability discrimination law usually becomes applicable *before* parties are similarly situated, while traditional discrimination law becomes applicable only after the parties are so situated. An equality claimant under traditional discrimination law, in other words, comes to the law already similarly situated to others. An equality claimant under disability discrimination law, on the other hand, often needs the operation of the law to become similarly situated.

The Supreme Court explicitly recognized many of these points recently in *U.S. Airways, Inc. v. Barnett*.<sup>153</sup> In that case, the plaintiff, after injuring his back while handling cargo for the airline, invoked seniority rights in order to be transferred to a position in the mailroom that would be less physically demanding.<sup>154</sup> Two years later, the mailroom position became open to bidding by more senior employees and two of those employees expressed interest in the position.<sup>155</sup> The plaintiff asked the employer to make an exception to the seniority policy so that he could retain his job in the mailroom.<sup>156</sup> The employer refused and litigation ensued.

The defendant in *Barnett* argued that the statute requires “only ‘equal’ treatment for those with disabilities” and that a legally mandated accommodation that goes beyond equal treatment would impermissibly require an employer to

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not result in my inclusion into mainstream society. To achieve that goal, I need to be treated differently from, not equally to, my hearing peers.

*Id.*

<sup>152</sup> As I discuss below, the relevant differences are not intrinsic to the individuals involved but are instead the result of socially constructed barriers (both tangible and intangible). See *infra* notes 174 and accompanying text.

<sup>153</sup> *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

<sup>154</sup> *Id.* at 394.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

give preferential treatment to one employee over another.<sup>157</sup> The defendant took the position that the ADA does not require that an employer make an exception to a disability-neutral rule in order to provide preferential treatment to employees with disabilities.

The Court rejected the defendant's interpretation of the statute by noting that reasonable accommodation by definition requires differential or preferential treatment. As the Court noted:

[w]hile linguistically logical, this argument [that preferential treatment is not required by the statute] fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.<sup>158</sup>

It is interesting that the Court in *Barnett* was not troubled by an employer's obligation under the ADA to provide a plaintiff with differential or preferential treatment, considering that the appropriateness of such treatment under Title VII (and under the Equal Protection Clause) is the subject of much controversy.<sup>159</sup> In

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<sup>157</sup> *Id.* at 397 (quoting 42 U.S.C. § 12101(a)(9) (2000)).

<sup>158</sup> *Id.* The Court provided several examples of the kind of neutral rules that would be beyond the reach of the ADA if it were to accept the defendant's argument:

Neutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor. Neutral "break-from-work" rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits. Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk. Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability. See 42 U.S.C. § 12111(9)(b) (setting forth examples such as "job restructuring," "part-time or modified work schedules," "acquisition or modification of equipment or devices," "and other similar accommodations"). Yet Congress, while providing such examples, said nothing suggesting that the presence of such neutral rules would create an automatic exemption.

*Id.* at 397–98.

<sup>159</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that affirmative action programs by the federal government are subject to strict scrutiny under the Equal Protection Clause); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that affirmative action programs by state and local governments are subject to strict scrutiny under the Equal Protection Clause); *United Steel Workers v. Weber*, 443 U.S. 193, 219–55

the ADA context, however, the issue of differential or preferential treatment for individuals with disabilities gave the Court in *Barnett* no pause. One of the reasons why differential or preferential treatment under the ADA is less controversial than affirmative action under Title VII is that the latter largely operates under a sameness model of equality.<sup>160</sup> Given that under that model, the prevailing legal obligation is, generally speaking, to treat everyone in the same way, when a party (such as one seeking affirmative action) seeks differential or preferential treatment, the request is understood by some as inconsistent with the equality goals of the law.

In *Barnett*, however, the Court held, that under the ADA, the differential or preferential treatment of a plaintiff is not improper because such treatment is often part of making a reasonable accommodations.<sup>161</sup> *Barnett* illustrates the extent to which a difference model of equality has been internalized into disability discrimination law.

If *Barnett* is the most recent illustration of the way in which disability discrimination law rejects the notion of formal equality by going beyond a simple demand for similar treatment for those similarly situated, feminist theory, as noted in Part I, provides us with a comprehensive critique of formal equality.<sup>162</sup> Feminists have grappled with how to account for women's differences in making equality claims. Although some feminist theorists have argued that emphasizing similarities between women and men is in the long-term best interests of women,<sup>163</sup> most have rejected that position by demanding differential treatment, for example, in matters related to sexual reproduction and pregnancy.<sup>164</sup> In fact,

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(1979) (Rehnquist, J., dissenting) (arguing that Title VII prohibits employers from providing race-based preferential treatment in all circumstances).

<sup>160</sup> I discuss at greater length the differences between reasonable accommodation and affirmative action in Ball, *supra* note 24, at 966–87. In that article, I also elaborate on the legitimate and necessary role that differential or preferential treatment plays in the attainment of the ADA's goals. *Id.* at 957–95.

<sup>161</sup> See *supra* note 158 and accompanying text. It is interesting to note that although Justice Scalia's dissent in *Barnett* took issue with several parts of the majority's opinion (such as the need, as he saw it, for a "but for" relationship between a plaintiff's disability and the accommodation requested), it did not disagree with the majority's broader point that the law of reasonable accommodation often calls for differential or preferential treatment. In fact, Justice Scalia distinguished his "but for" argument from the defendant's argument that preferential treatment is never required under the ADA. *Barnett*, 535 U.S. at 417–18 (Scalia, J., dissenting).

<sup>162</sup> See *supra* notes 62–73 and accompanying text.

<sup>163</sup> See articles by Wendy Williams cited in *supra* note 45.

<sup>164</sup> See Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279, 279 (1998) (noting that most feminist legal theorists favor differential or special treatment for women). Even feminists who generally support a sameness model of equality make an exception for issues of reproduction and pregnancy. See Herma Hill Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39, 81–87 (arguing for equal treatment except in matters that are unique to women such as pregnancy,

the first area of American discrimination law where the idea of requiring accommodation as a way of providing for equality of opportunity gained a foothold (other than religion cases, where only de minimus accommodation is required)<sup>165</sup> was that of pregnancy.<sup>166</sup> Feminists have argued that pregnancy accommodations “place[ ] women on an equal footing with men and permit[ ] males and females to compete equally in the labor market.”<sup>167</sup>

Other feminist theorists have gone beyond a focus on what can be viewed as “natural” differences between women and men (such as the ability to become pregnant) by demanding that the law recognize and account for the cultural differences between them that disadvantage women.<sup>168</sup> Thus, for example, some feminists argue that discrimination law should recognize the fact that women continue to provide the bulk of caregiving in our society and that those caregiving obligations place women at a disadvantage when competing with men in the labor market.<sup>169</sup>

Despite the criticisms of formal equality raised by many feminist academics,<sup>170</sup> however, sex discrimination law in the United States (with the exception of pregnancy cases) remains firmly tied to a formal model of equality that asks simply that women be treated in the same way as men.<sup>171</sup> It is *disability* discrimination law that has most clearly rejected that model and adopted the feminist position on difference and equality. In the area of employment, treating employees with disabilities like everyone else can end up reinforcing and reproducing inequalities.<sup>172</sup> Although it can be argued, as many feminist theorists have done, that laws prohibiting discrimination on the basis of sex or gender

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menstruation, and rape); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1007–13 (1984) (arguing for equal treatment except in matters relating to reproduction).

<sup>165</sup> See *supra* note 7.

<sup>166</sup> See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987) (rejecting argument that California’s pregnancy disability-leave statute violated Title VII because it required the “special treatment” of women).

<sup>167</sup> Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women’s Equality*, 13 GOLDEN GATE U. L. REV. 513, 533 (1983) (emphasis omitted).

<sup>168</sup> See Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

<sup>169</sup> See Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 444–67 (2001).

<sup>170</sup> See sources cited in *supra* note 48.

<sup>171</sup> See Kessler, *supra* note 169, at 391–419; see also Eichhorn, *supra* note 109, at 581 (arguing that “Title VII strays only occasionally from a strict formal equality model.”); Williams, *supra* note 164, at 279 (noting that those advocating in favor of treating women in the same way as men have prevailed in matters of law and policy).

<sup>172</sup> See *supra* note 151 and accompanying text.

*should* address the ways, both physical and socially constructed, that women are different from men,<sup>173</sup> disability discrimination law *already* accounts for the differences between the disabled and the able-bodied. A formal kind of equality, where the only obligation is to treat similarly those who are already similarly situated, will not provide meaningful equality to the disabled. What disability discrimination law demands is something much closer to the understanding of equality held by feminist theory, one sensitive and attuned to issues of difference.

It is crucial at this point in my argument to emphasize that the differences between disabled and able-bodied employees that impose equality obligations on employers should not be understood to be differences that are intrinsic to the individuals involved. As already noted, a prevalent (and in my view, correct) understanding of disability is one that views functional limitations that rise to the level of disability as resulting from barriers (both tangible and intangible) created by the relationships and environments of individuals.<sup>174</sup> It is these barriers that place disabled individuals in positions whereby they are not similarly situated to others. It is, in turn, the need to remove these barriers that explains why it is necessary for disability discrimination law to impose equality-based obligations on employers vis-à-vis their employees with disabilities even though those employees are not similarly situated to others.

Disability discrimination law, like much of feminist theory, holds that difference often demands rather than precludes the application of equality principles. It is precisely because disabled and able-bodied employees are sometimes not similarly situated—the result, as we have seen, of socially constructed barriers that limit the functionality of individuals with disabilities—that requires employers to accommodate the former. If the two groups of employees were always similarly situated, then equality of opportunity could be guaranteed under the sameness model of equality found in Title VII.

The liberal approach to differences in the context of equality, namely, one that deems them as either irrelevant<sup>175</sup> or as precluding the application of equality norms to begin with (because the presence of difference means that the party making the equality claim is not similarly situated to others),<sup>176</sup> proves

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<sup>173</sup> See *supra* notes 45–48 and 162–69 and accompanying texts.

<sup>174</sup> See *supra* notes 117–21 and accompanying text (discussing the social model of disability). I do not mean to suggest that physical and mental impairments are irrelevant to the question of who is disabled. My point instead is that those impairments are often not determinative of disability. It is true that there are some individuals whose impairments are so severe that no changes in their relationships and environments will allow them to function in economically productive ways. It was not the intent of Congress, however, to provide employment discrimination protection to those individuals. See 42 U.S.C. § 12112(a) (2000) (prohibiting “discriminat[ion] against a *qualified* individual with a disability”) (emphasis added).

<sup>175</sup> See *supra* notes 31–35 and accompanying text.

<sup>176</sup> See *supra* note 36 and accompanying text.

incompatible with the conception of equality that undergirds disability discrimination law. In contrast, a concept of equality, as understood by feminist theory, which incorporates and accounts for difference, is better suited as a theoretical foundation for disability discrimination law.

## *2. Reasonable Accommodation and Dependency*

The issue of difference is not the only important aspect of reasonable accommodation law in the context of disability that is consistent with feminist theory. Another such aspect is the way in which accommodation law acknowledges and addresses dependency in promoting equality of opportunity. As we have seen, issues of dependency, while largely ignored by liberal theory, are important to a feminist understanding of equality. Professor Kittay, for example, argues that we have to account for relationships of dependency in order to provide meaningful equality to both dependents and their caretakers.<sup>177</sup>

If we apply to the employment context a liberal understanding of equality that (1) looks for the existence of similarities between the party making the equality claim and those who enjoy the benefit or privilege that is the subject of the claim, and (2) views individuals as equally self-reliant and independent, then the idea (or reality) of dependency undermines, rather than accounts for, the imposition of a legal obligation on employers to accommodate the disabilities of their employees. Under such an understanding of equality, any given employee would be expected to do the work exactly as required by the employer. Of course, if the employer's prejudices related to a protected trait (be it race, sex, or disability) limit the opportunity of the employee in question to demonstrate her ability to perform the job, then at that point the law would intervene. But in the absence of differential treatment by the employer on the basis of a protected trait, the employee would be expected, under a liberal understanding of equality, to be able to perform the job based on her talents and abilities as required by the employer, and if she cannot do so the employer is free to take appropriate action. The principle of reasonable accommodation under disability discrimination law, on the other hand, recognizes that in many instances members of the protected class will be able to perform the essential functions of the job *only* with the assistance of others. Whether an employer makes that assistance available becomes a crucial part of the analysis of whether it provides employees with disabilities with an equal opportunity to compete.

Before I begin the discussion of how issues of dependency play out in the law of reasonable accommodation, I want to make it clear that I am not suggesting that dependency in the workplace exists only for employees with disabilities. Most able-bodied employees are also dependent on employers to create the necessary workplace conditions that allow for the successful performance of jobs.

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<sup>177</sup> See *supra* notes 75–80 and accompanying text.

The dependency of able-bodied employees, however, goes unacknowledged because the mitigation of that dependency is taken for granted; able-bodied employees are almost always in the majority and their needs set the norms that determine the kind of assistance that employers provide as a matter of course. Thus, for example, white collar and clerical employees are as a matter of course given chairs by their employers so that they can perform their jobs in relative comfort. Employers also as a matter of course provide adequate lighting in the workplace so that employees with standard vision can see. Able-bodied employees are *dependent* on these types of employer-provided goods and services even though there might be other employees who do not need them. (The employee who uses a wheelchair does not need an employer-provided chair and the employee who is blind does not need employer-provided lighting.) Discrimination law, however, does not regulate the dependency of able-bodied employees because employers make the necessary adjustments to the workplace on their own. It is the kind of assistance that disabled employees need that employers have traditionally refused to provide, which is why the provision of such assistance becomes part of the regulatory ambit of disability discrimination law.

The nature of the assistance that must be provided to individuals with disabilities under disability discrimination law varies from case to case. The interpretative guidance to the EEOC's ADA regulations states that "[i]n general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."<sup>178</sup> The ADA itself defines the meaning of reasonable accommodation by providing a broad and nonexclusive list of examples. One of the examples listed is "making existing facilities used by employees readily accessible to and usable by individuals with disabilities."<sup>179</sup> This example illustrates how, in some instances, the failure by an employer to provide assistance to a disabled employee by modifying the physical structure of the workplace so that it becomes accessible means that that employee will not receive an equal opportunity to perform the job. The ability of some employees with disabilities to enjoy an equal opportunity to compete, in other words, depends on the willingness of employers to take affirmative steps to make workplaces physically accessible.

Another example listed in the statutory definition of reasonable accommodation is the employer's "acquisition or modification of equipment or devices."<sup>180</sup> This example illustrates how individuals with disabilities sometimes depend on employer-provided technology as a way of attaining equal opportunity in the workplace. Another example listed in the definition is "the provision of

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<sup>178</sup> 29 C.F.R. pt. 1630 app. § 1630.2(o) (2001).

<sup>179</sup> 42 U.S.C. § 12111(9)(A) (2000).

<sup>180</sup> 42 U.S.C. § 12111(9)(B) (2000).



qualified readers or interpreters.”<sup>181</sup> This example illustrates how disabled employees sometimes depend on the assistance provided by other employees.

A specific example of this last category of dependency by employees with disabilities is found in the important case of *Borkowski v. Valley Central School District*.<sup>182</sup> In *Borkowski*, the plaintiff was an elementary school library teacher who, as a result of an automobile accident, “suffered a major head trauma and sustained serious neurological damage.”<sup>183</sup> The plaintiff, due to her impairment, had “continuing difficulties with memory and concentration, and as a result ha[d] trouble dealing with multiple simultaneous stimuli.”<sup>184</sup> This resulted in the plaintiff having difficulty maintaining discipline in the classroom. After several in-class evaluations by her supervisors, Ms. Borkowski was eventually denied tenure because of poor classroom performance.<sup>185</sup> She requested that the school hire a teacher’s aide to help maintain discipline in the classroom while she performed the other job functions of a library teacher.<sup>186</sup> The school refused and she sued under the Rehabilitation Act of 1973.<sup>187</sup>

The defendant moved for summary judgment arguing, *inter alia*, that the plaintiff’s requested accommodation was unreasonable as a matter of law.<sup>188</sup> The district court granted the defendant’s motion, but the court of appeals reversed, ruling that there were material issues of fact as to whether maintaining discipline was an essential function of the job of an elementary school library teacher.<sup>189</sup> “This is especially so” the court noted, “since the regulations implementing Section 504 [of the Rehabilitation Act] explicitly contemplate that teachers with disabilities may require the assistance of teachers’ aides.”<sup>190</sup>

The employer’s position in *Borkowski* was essentially as follows: if the plaintiff needs the assistance of another employee to maintain discipline in the

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<sup>181</sup> *Id.*

<sup>182</sup> *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131 (2d Cir. 1995).

<sup>183</sup> *Id.* at 134.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 134–35.

<sup>188</sup> *Borkowski*, 63 F.3d at 142. The defendant also argued that the hiring of a teacher’s aide to assist the plaintiff would constitute an undue hardship. *Id.* at 142–43.

<sup>189</sup> *Id.* at 140–42. An employer may be required to reassign to another employee a job’s marginal (but not essential) functions. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (2001) (noting that “[a]n employer or other covered entity is not required to reallocate essential functions” of the job).

<sup>190</sup> *Borkowski*, 63 F.3d at 141 (citing 45 C.F.R. pt. 84 app. A, at 376). The EEOC’s interpretative guidance to its ADA regulations makes a similar point, noting that “[p]roviding personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may also be a reasonable accommodation.” 29 C.F.R. pt. 1630 app. § 1630.2(o) (2001).

classroom, then she is not qualified for the position.<sup>191</sup> The court of appeals rejected this argument because requiring the assistance of an aide did not make the plaintiff unqualified as a matter of law: the plaintiff had to be given an opportunity to demonstrate at trial that the assistance requested by her was a reasonable accommodation—one that was required of the employer in order to provide her with an equal opportunity to perform the job.<sup>192</sup> As *Borkowski* makes clear, disability discrimination law contemplates that, at least in some instances, an employer's refusal to make available to an employee with a disability the assistance of another employee is itself a form of discrimination. This is an example of the way in which disability discrimination law links issues of dependency with notions of equality.

Dependency is problematic under the sameness model of equality promoted by liberal theory because its existence can be viewed as a significant difference that justifies unequal treatment. A party who is dependent on others, in other words, can be understood as being differently situated from someone who is not dependent, making the former ineligible for the protections afforded by equality doctrine. Under the sameness model, for example, an employer who refuses to provide special assistance to any employee and instead expects all employees to perform according to their own (unassisted) abilities, can be understood as doing everything that equality requires by treating all employees in the same manner.

In contrast, a feminist understanding of equality is more apt to recognize the need to account for issues of dependency in thinking about what equality requires.<sup>193</sup> Feminist theory reminds us that dependency is not an isolated matter or condition, but instead (at one time or another) plays a role in the lives of all individuals. A vision of equality that is cognizant of and attuned to issues of dependency is more likely to acknowledge the inequalitarian aspects of employers' policies that, as a matter of course, address the dependency of able-bodied employees but not that of disabled employees.<sup>194</sup>

Furthermore, feminist theory argues that public policies must account for the existence of dependency. As Professor Kittay points out, society must address the disadvantages (for both dependents and caregivers) that can accompany dependency.<sup>195</sup> Feminist theory, in short, seeks to account for (rather than ignore or dismiss) issues of dependency when speaking of equality. It is not enough to argue that issues of dependency are private matters to be dealt with by individuals

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<sup>191</sup> *Borkowski*, 63 F.3d at 142.

<sup>192</sup> *Id.* at 140–42.

<sup>193</sup> See *supra* notes 74–80 and accompanying text; see also FINEMAN, *supra* note 63, at xvii (arguing that “[d]ependency . . . is . . . one of the human and societal circumstances that must be addressed as part of achieving equality.”).

<sup>194</sup> See discussion beginning Part B.II.2.

<sup>195</sup> KITTAY, *supra* note 75, at 186–87.

as best they can through their own efforts and through whatever assistance can be provided by family and friends.<sup>196</sup>

The enactment of a statute such as the ADA is an attempt to recognize that issues of dependency, at least in the workplace, are a legitimate subject of public regulation.<sup>197</sup> Disability discrimination law holds that when employers *ignore* the dependencies of their employees with disabilities, they *discriminate* against them. Under the ADA, the fact that an employee may depend on the assistance provided by an employer in order to perform the job successfully does not vitiate an equality claim; in fact, the opposite is the case: the equality claim, as shown by cases such as *Borkowski*, is sometimes driven by the very *need* for assistance. In this way, disability discrimination law links equality and dependency in a manner that is consistent with feminist theory.

### 3. Reasonable Accommodation, the Interactive Process, and the Importance of Communication

As already noted, the principal mandate imposed on employers by traditional discrimination law is a negative one: it requires the employer to ignore the race or sex of an employee in making employment-related decisions.<sup>198</sup> Disability discrimination law, on the other hand, usually requires the employer to account proactively for the protected trait (i.e., the disability) through an accommodation. This positive obligation imposed on employers by disability discrimination law is more complicated than the negative obligation imposed by traditional discrimination law. This is because under disability discrimination law, an accommodation must be found that is (1) effective in helping the employee perform the job and (2) consistent with the legitimate workplace-related interests of the employer (such as cost, efficiency, and productivity). In order to help the parties arrive at an accommodation that meets the needs of both sides, disability discrimination law requires an employer, once an employee with a disability requests an accommodation, to engage in an interactive process with that employee.<sup>199</sup>

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<sup>196</sup> See *id.*

<sup>197</sup> That dependency, as we have seen, can relate to matters as varied as physical access to the workplace, reliance on technology, and assistance from other employees. See *supra* notes 178–92 and accompanying text.

<sup>198</sup> See *supra* notes 142–44 and accompanying text.

<sup>199</sup> See, e.g., *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 311–17 (3d Cir. 1999); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171–73 (10th Cir. 1999). If an employer fails to engage in an interactive process in good faith, it may not win a motion for summary judgment on the reasonableness of the accommodation requested by the plaintiff. See *Barnett v. U.S. Airways, Inc.*, 228 F.3d 1105, 1115–16 (9th Cir. 2000) (en banc), *vacated on other grounds*, 535 U.S. 391 (2002); *Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 727 (8th Cir. 1999). Even in cases where the employer fails to engage in the interactive process, however, the

In some instances, the interactive process is simple and brief. As the Senate Committee on Labor and Human Relations noted in its report accompanying the bill that eventually became the ADA, "people with disabilities may have a lifetime of experience identifying ways to accomplish tasks differently in many different circumstances. Frequently, therefore, the person with a disability will know exactly what accommodation he or she will need to perform successfully in a particular job."<sup>200</sup> In these kinds of cases, the interactive process is limited to the employer learning from the employee what would constitute an appropriate accommodation.

In cases where the appropriate accommodation might be less obvious, the EEOC's interpretative guidance calls on employers to "use[ ] a problem solving approach."<sup>201</sup> In such circumstances, the employer must (1) analyze the job in question to determine its essential functions, (2) consult with the disabled employee about the job-related limitations caused by the disability and how those limitations should be overcome, (3) identify potential accommodations and their effectiveness in consultation with the disabled employee, and (4) consider the employee's preferred accommodation.<sup>202</sup>

By requiring employers and employees to engage in this type of joint problem-solving,<sup>203</sup> disability discrimination law encourages the parties to communicate and exchange concerns and ideas regarding possible accommodations. An interactive process in this context makes a great deal of sense because the employee has greater knowledge than does the employer about what she can accomplish despite the limitations that accompany her disability.<sup>204</sup> The employer, on the other hand, is more knowledgeable about workplace needs and requirements, as well as about organizational, structural, and competitive

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plaintiff, in order to prevail on a discrimination claim, must show that a reasonable accommodation is possible. *See Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 515 (1st Cir. 1996); *Willis v. Conopco*, 108 F.3d 282, 285-86 (11th Cir. 1997).

<sup>200</sup> S. REP. NO. 101-116(I), at 34 (1990). The report adds that "frequently, the employee's or applicant's suggested accommodation is simpler and less expensive than the accommodation the employer might have devised, resulting in the employer and the employee mutually benefiting from the consultation." *Id.*

<sup>201</sup> 29 C.F.R. pt. 1630 app. § 1630.9 (2003).

<sup>202</sup> *Id.* The interactive process delineated in the EEOC's Interpretative Guidance mirrors the one suggested by the Senate Committee Report. Both documents make clear that while the employee's preferred accommodation should be given primary consideration, an employer may choose another accommodation as long as it is effective. *Id.*; S. REP. NO. 101-116(I), at 35.

<sup>203</sup> If an employee fails to engage in the interactive process in good faith, that may be enough to reject her discrimination claim under the ADA. *See Phelps v. Optima Health*, 251 F.3d 21, 27-28 (1st Cir. 2001); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135-37 (7th Cir. 1996).

<sup>204</sup> *See Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997); S. REP. NO. 101-116(I), at 34.

issues.<sup>205</sup> The idea behind the interactive process is to encourage both sides to share information and proposals in order to arrive at a result that best meets the interests of all concerned.

Disability discrimination law, then, recognizes that equality in the workplace can be promoted by encouraging the parties to come together in order to share information and learn from each other. It recognizes, in other words, that a willingness on the part of employers and employees to seek a solution *together* is likely to contribute to the attainment of equality in the workplace. It also understands that equality of opportunity is not always provided solely by employers acting independently of employees; instead, the contributions of employees are essential because of the employees' familiarity with their disabilities and with the ways in which the limitations that accompany those disabilities can best be overcome.

All of these points are consistent with positions taken by feminist and communitarian theorists. The feminist philosopher Christine Koggel, for example, stresses the importance of interaction and communication in a relational theory of equality.<sup>206</sup> It is through communication that we recognize the needs and interests of others and thus better understand their claims to equality. A feminist/relational theory of equality, as the name suggests, encourages us to focus on the relationships between parties to see whether their nature and dynamic permit the creation of conditions that promote equality.<sup>207</sup> It is reasonable to believe that relationships in which there is open and frank discussion are more likely to foster equality than ones in which communication is lacking.

Communitarians, for their part, have emphasized the importance of communication and participation in getting citizens to work together to find common ground and reach common goals.<sup>208</sup> From a communitarian perspective, equality, as well as autonomy, is best promoted by purposefully encouraging interaction and dialogue with the hope of allowing individuals to understand each other better and to work together for the attainment of shared goals.<sup>209</sup> In their different ways, then, feminists and communitarians have noted the importance of communication and of reaching solutions by working together rather than through a clash of opposing, and often mutually irreconcilable, positions.

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<sup>205</sup> See *Woodman v. Runyon*, 132 F.3d 1330, 1343 (10th Cir. 1997) (noting that "the employer has far greater access to information than the typical plaintiff, both about its own organization, and equally importantly, about the practices and structure of the industry as a whole.") (quoting *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 137 (2d Cir. 1995)).

<sup>206</sup> See *supra* notes 71–72 and accompanying text.

<sup>207</sup> See *supra* notes 65–70 and accompanying text.

<sup>208</sup> See *supra* notes 97–99 and accompanying text.

<sup>209</sup> See *supra* notes 97–99 and accompanying text.

In contrast to feminist theory and communitarian theory, a vision of formal equality that is primarily interested in guaranteeing similar treatment for the similarly situated misses the importance of communication and dialogue in promoting equality. In the particular context of employment and disability, a lack of communication between an employer and an employee with a disability can be fatal to the latter's quest for equal opportunity. A lack of communication may leave in place a series of misunderstandings, based on generalizations and stereotypes, held by the employer as to the scope of the limitations that result from the physical or mental disability. Similarly, the absence of dialogue may make it more difficult for the employer to understand that accommodating a disabled employee is often inexpensive and can be in the employer's best long-term interest.<sup>210</sup> Finally, since the benefits of communication run both ways, the interactive process gives the employee a better understanding of the legitimate needs and interests of the employer that can appropriately be taken into account in arriving at a reasonable accommodation. For all of these reasons, the interactive process requirement of disability discrimination law links equality with communication and dialogue in the same way that, as we have seen, other more substantive components of disability discrimination law link equality with difference and dependency.<sup>211</sup>

### *C. Segregation of Individuals with Mental Disabilities*

In Part II.B., the discussion of disability discrimination law in general and of reasonable accommodation law in particular was limited to the employment context. In this section, I move beyond employment issues to discuss disability discrimination law in the area of public services and benefits. In particular, I here explore the obligation of states to move eligible individuals with mental disabilities out of state institutions and into community-based treatment settings. This obligation, as explained by the Supreme Court in *Olmstead v. L.C.*,<sup>212</sup> is consistent with two basic communitarian principles: first, that participation in community life plays a crucial role in the lives of individuals, and second, that the interests of nonclaimants should be accounted for when determining the rights of claimants.<sup>213</sup>

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<sup>210</sup> See S. REP. NO. 101-116(I), at 34 (1990).

<sup>211</sup> See *supra* notes 142-97 and accompanying text.

<sup>212</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999).

<sup>213</sup> The issue of integration of individuals with disabilities into the community also brings to mind the feminist emphasis on relationships. See *supra* notes 65-70 and accompanying text. I have chosen to focus on communitarianism in this section of the Article because, for reasons that should become clear as the discussion proceeds, the emphasis by disability discrimination law on participation in community life resonates even more strongly with communitarian theory.

The plaintiffs in *Olmstead* were two developmentally disabled women who suffered from mental illnesses.<sup>214</sup> Both women had histories of institutionalization and were living in institutions operated by the State of Georgia when the litigation began in the mid-1990s.<sup>215</sup> The plaintiffs, after their respective treating psychiatric teams concluded that they would be better served by receiving medical treatment and other services while living in the community, argued that their continued institutionalization violated the ADA.<sup>216</sup> The State contended that it could not place the plaintiffs in community settings because it did not have the funding to do so. The State, in fact, in its motion for summary judgment, argued that it had not violated the ADA because the reason the plaintiffs remained institutionalized was not because of their disabilities but was instead the result of a lack of available funding.<sup>217</sup> The plaintiffs argued that the failure to place them in a more integrated setting, when such placements were medically appropriate, violated the ADA and its regulations.<sup>218</sup> In particular, they argued that the state action (or more, accurately, *inaction*) in their cases violated the requirement under the ADA's regulations that state services and benefits be provided in "the most integrated setting appropriate to the needs of qualified individuals with disabilities."<sup>219</sup>

The district court granted summary judgment to the plaintiffs. It held that their continued institutionalization, after professional treatment teams concluded that such institutionalization was medically unnecessary, "constitute[d] discrimination per se, which cannot be justified by a lack of funding."<sup>220</sup> The court noted that it was less expensive to treat individuals in community-based settings than in state institutions.<sup>221</sup> The court added that neither administrative nor fiscal convenience could justify the provision of services to individuals with disabilities in a segregated manner.<sup>222</sup>

The State raised two principal arguments on appeal. The first was that the ADA had not been violated because it "requires a comparison of the treatment of

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<sup>214</sup> *Olmstead*, 527 U.S. at 593. One plaintiff, L.C., was schizophrenic and the other, E.W., had a personality disorder. *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* The plaintiffs also raised a due process claim. The district court, once it granted the plaintiffs' summary judgment on the ADA claim, held that the constitutional claim was rendered moot. *L.C. v. Olmstead*, 9 Nat'l Disability L. Rep. ¶ 276, at 995, 1997 WL 148674 (N.D. Ga. 1997).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 994.

<sup>219</sup> 28 C.F.R. § 35.130(d) (2001).

<sup>220</sup> *L.C.*, 9 Nat'l Disability L. Rep. ¶ 276, at 995.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

individuals with disabilities against that of healthy non-disabled persons.”<sup>223</sup> The State argued that since there was no comparison group that received a benefit that was denied to the plaintiffs, the ADA was not violated.<sup>224</sup> The second argument was that requiring the State to place the plaintiffs in community-based treatment settings when it had no funding to do so would constitute a fundamental alteration of its program.<sup>225</sup> As I explain below, the way in which the Supreme Court addressed each of these arguments is consistent with important principles of communitarian theory.

Before I proceed to explain why the Supreme Court’s opinion in *Olmstead* is consistent with communitarian theory, it is helpful to summarize briefly the reasoning of the court of appeals in rejecting both of the State’s arguments. On the issue of a lack of a comparison group, the court of appeals reasoned that “where, as here, the State confines an individual with a disability in an institutionalized setting when a community placement is appropriate, the State has violated the core principle underlying the ADA’s integration mandate.”<sup>226</sup> The fact that the plaintiffs were seeking community-based treatment services that were not made available to nondisabled individuals did not, as the State argued, preclude their discrimination claim under the ADA. The court reasoned that the ADA not only prohibits disparate treatment of individuals with disabilities, but it also requires that they “be accorded reasonable accommodations *not* offered to other persons in order to ensure that [they] enjoy ‘equality of opportunity, full participation, independent living, and economic self-sufficiency.’”<sup>227</sup> According to the court of appeals, therefore, the failure to provide services to individuals with disabilities in the most integrated setting that is appropriate to their needs constitutes discrimination under the ADA even if the State is not treating any other group differently.<sup>228</sup>

As to the fundamental alteration defense, the court of appeals concluded that the district court erred in holding that the defense was unavailable to the State. The court of appeals noted that the deinstitutionalization of some individuals with disabilities that does not also lead to the “shut[ting] down [of] entire hospitals or hospital wings . . .” may not save the State money “because of fixed overhead

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<sup>223</sup> *L.C. v. Olmstead*, 138 F.3d 893, 896 (11th Cir. 1998).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 904. The Department of Justice’s regulations to Title II state that “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7) (2001).

<sup>226</sup> *L.C.*, 138 F.3d at 897.

<sup>227</sup> *Id.* at 899 (quoting 42 U.S.C. § 12101(a)(8) (1994)).

<sup>228</sup> *Id.*



costs associated with providing institutional care.”<sup>229</sup> Even if the plaintiffs were deinstitutionalized, in other words, the State would still have to keep open slots in institutions for individuals with mental disabilities who need a more intensive treatment setting. Issues of cost, therefore, might legitimately be raised by the State in a failure to integrate case.<sup>230</sup>

The court reasoned, however, that in cases such as *Olmstead*, where the continued institutionalization of the plaintiffs was medically unnecessary, the scope of the fundamental alteration defense should be relatively limited.<sup>231</sup> In such cases, the court noted, the State is obligated under the ADA to allocate additional expenditures in order to provide services in more integrated settings.<sup>232</sup> The court concluded that “[u]nless the State can prove that requiring it to make these additional expenditures would be so unreasonable given the demands of the State’s mental health budget that it would fundamentally alter the service it provides, the ADA requires the State to make these additional expenditures.”<sup>233</sup> The State, in other words, in order to succeed with its fundamental alteration defense, would have to show that the cost of the plaintiffs’ deinstitutionalization is unreasonable in light of the total funds allocated to mental health care.

### 1. Segregation, the Importance of Community Life, and Equality

The comparison group argument made by the State in the *Olmstead* litigation is consistent with the understanding of equality held by liberal theory. That understanding, as we have seen, begins with the question of whether the parties claiming a right to equality are similarly situated to those receiving the benefit or privilege that is the subject of the claim. If the claimants are similarly situated to the comparison group and they are nonetheless denied the benefit, then the principle of liberal equality has been violated.<sup>234</sup>

In *Olmstead*, there was no group that the State was treating differently from the plaintiffs. As a result, the State argued, and Justice Thomas in his dissenting opinion agreed, there was by definition no discrimination. As Justice Thomas put it, “[d]iscrimination, as typically understood, requires a showing that a claimant received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic.”<sup>235</sup>

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<sup>229</sup> *Id.* at 905.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *L.C.*, 138 F.3d at 904–05.

<sup>233</sup> *Id.* at 905.

<sup>234</sup> See *supra* notes 31–35 and accompanying text.

<sup>235</sup> *Olmstead v. L.C.*, 527 U.S. 581, 616 (1999) (Thomas, J., dissenting). According to Justice Thomas, not only must there be a comparison group for there to be a successful discrimination claim, but that group must be different from the group to which the plaintiffs

The Court, in its approach to the equality claim at issue in *Olmstead*, however, rejected the idea that there has to be a comparison group of individuals that the state treats differently in order for a valid discrimination claim to exist. The Court began its analysis by pointing out that the harm associated with the segregation of individuals with disabilities was one of the concerns that led Congress to enact the ADA.<sup>236</sup> It added that Congress, in the statute's findings, explicitly identified "'segregation' of persons with disabilities as a 'for[m] of discrimination.'"<sup>237</sup>

The Court then proceeded to discuss the harms associated with segregation as a way of explaining why it was evident that the "unjustified institutional isolation of persons with disabilities is a form of discrimination."<sup>238</sup> It is at this point that the Court emphasized one of the core themes of communitarianism, namely, the importance to individuals of participation in community life.<sup>239</sup> The Court noted that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."<sup>240</sup> The Court added that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."<sup>241</sup>

According to the Court, therefore, "Congress had a more comprehensive view of the concept of discrimination advanced by the ADA" than simply asking whether similarly situated individuals were "given preferential treatment."<sup>242</sup> The

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belong. In other words, the fact that the state treats some disabled individuals differently than other disabled individuals (e.g., the fact that it provides some disabled individuals with services in institutions and other disabled individuals with services in more integrated settings) does not violate the ADA because the state is not treating the disabled differently than the nondisabled. *Id.* at 616–20; see also *Easley v. Snider*, 36 F.3d 297, 305–306 (3d Cir. 1994) (holding that the ADA does not require the state to provide the same services or benefits to one group of individuals with disabilities that it provides to another group of individuals with different disabilities).

Justice Kennedy in *Olmstead* concurred in the Court's judgment but did not join its opinion because he also believed that the plaintiffs should be required to show that they were treated differently than a similarly situated group. See *Olmstead*, 527 U.S. at 611–12 (Kennedy, J., concurring).

<sup>236</sup> *Olmstead*, 527 U.S. at 599–600.

<sup>237</sup> *Id.* at 600 (quoting 42 U.S.C. § 12101(a)(2) (1994)).

<sup>238</sup> *Id.*

<sup>239</sup> See *supra* notes 81–92 and accompanying text.

<sup>240</sup> *Olmstead*, 527 U.S. at 600 (citations omitted).

<sup>241</sup> *Id.* at 601.

<sup>242</sup> *Id.* at 598. The Court did point out that there was "[d]issimilar treatment . . . in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical

Court deemed the effects of unjustifiably excluding individuals with disabilities from community life, and from ongoing and meaningful relationships with family, friends, and neighbors, to be so deleterious that a failure to provide services in the most integrated setting possible had to be in and of itself violative of the ADA.<sup>243</sup>

The disagreement between the majority and the dissent in *Olmstead* as to what discrimination means under the ADA could be understood in terms of differences in interpretative approaches to the statute. Justice Thomas in his dissent, for example, was not convinced that the broad language found in the statute's findings—on which the majority relied to support its holding<sup>244</sup>—was sufficient to depart from what he took to be an essential element of a discrimination claim, namely, the identification of a group of individuals that received a benefit denied to the plaintiffs.<sup>245</sup> But at a deeper level, there was a more fundamental disagreement between the majority and dissenting opinions *as to what equality means and what it requires*. The dissent, as well as the State, relied on a rather formalistic approach to equality, asking whether there were parties who were similarly situated to the plaintiffs but who were nonetheless treated differently by the State. The Court, on the other hand, was more expansive in its approach to the equality claim raised by the plaintiffs, reasoning that the State was hindering the ability of individuals with disabilities to participate in community life and to have the kinds of relationships with others that are such an important part of the daily lives of most individuals.<sup>246</sup> The Court reasoned that if the ADA was about nothing more than making sure that the State provides disabled individuals with the same services and benefits that it makes available to the nondisabled, the statute would fail to address the significant harms associated with the isolation and segregation of individuals with mental disabilities.<sup>247</sup> According to the Court, then, equality principles as codified in the ADA require

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services they need without similar sacrifice.” *Id.* at 601. Earlier in the opinion, however, the Court explicitly concluded that the absence of an identifiable comparison group did not preclude a discrimination claim under the ADA. *Id.* at 598.

<sup>243</sup> *Id.* at 600.

<sup>244</sup> See *supra* note 237 and accompanying text. “The Congressional findings,” Justice Thomas reasoned, “are written in general, hortatory terms and provide little guidance to the interpretation of the specific language of” Title II. *Olmstead*, 527 U.S. at 620–21 (Thomas, J., dissenting). Justice Thomas also pointed out that Title I of the ADA, which covers employment, explicitly “defines discrimination to include ‘limiting, segregating, or classifying a job applicant or employee.’” *Id.* at 622 (citing 42 U.S.C. § 12112(b)(1) (1994)). Title II, on the other hand, does not explicitly mention segregation. “Ordinary canons of construction,” Justice Thomas added, “require that we respect the limited applicability of [Title I’s] definition of ‘discrimination’ and not import it into other parts of the law where Congress did not see fit.” *Id.* at 622.

<sup>245</sup> *Olmstead*, 527 U.S. at 616 (Thomas, J., dissenting).

<sup>246</sup> See *supra* notes 236–43 and accompanying text.

<sup>247</sup> *Olmstead*, 527 U.S. at 598–600.

more than just similar treatment for the similarly situated; they also demand a recognition of the importance of individuals' ties to and relationships with others.<sup>248</sup> In this way, the Court's broader understanding of equality explicitly incorporates communitarian principles.

The goal of integrating individuals with disabilities into the community has been of the utmost importance to disability rights activists for many years. Although treatment for the mentally disabled inside institutions was the norm between the middle of the nineteenth century and the middle of the twentieth century, there has since been a continued push by activists to deinstitutionalize as many individuals with disabilities as possible.<sup>249</sup> In fact, "[s]ince the 1960s, nearly 1.5 million people have been released into community settings" in the United States.<sup>250</sup> In advocating for policies of deinstitutionalization, proponents of integration have sought to "normalize" the lives of individuals with disabilities.

Normalization assumes that people's social roles are enhanced by age-appropriate activities in settings in which those activities usually occur, by having friends and other associates who are themselves valued socially in the community, and by participating in typical social, cultural, and economic roles in the community.<sup>251</sup>

Proponents of deinstitutionalization have argued that it is impossible for individuals to lead full lives isolated from others without a meaningful opportunity to participate in community life.<sup>252</sup> The importance of community life and of meaningful and rich interactions with others, as we have seen, is a central concern of communitarian theory.<sup>253</sup> The Court in *Olmstead* endorsed the views of both disability activists and communitarians by (1) deeming the unnecessary isolation of individuals from community life to be a form of discrimination and (2) holding that the equality principles codified in the ADA are violated in cases of improper segregation, even in the absence of an identifiable comparison group.

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<sup>248</sup> *Id.* at 600.

<sup>249</sup> See Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits after Olmstead v. L.C.*, 24 HARV. J.L. & PUB. POL'Y 695, 703-07 (2001).

<sup>250</sup> *Id.* at 707.

<sup>251</sup> John V. Jacobi, *Federal Power, Segregation, and Mental Disability*, 39 HOUS. L. REV. 1231, 1252 (2003) (citation omitted).

<sup>252</sup> See Smith & Calandrillo, *supra* note 249, at 703-07.

<sup>253</sup> See *supra* notes 81-96 and accompanying text.

## 2. *The Interests of Nonclaimants, Communitarian Theory, and the Fundamental Alteration Defense*

The elements of disability discrimination law that I have argued are consistent with feminist and communitarian theory are also, on the whole, helpful to individuals with disabilities in bringing legal claims. The scope and applicability of disability discrimination law is broader and more comprehensive because it (1) accounts for not just internal physical or mental impairments, but also for the relationships and environments that are part of the daily lives of individuals;<sup>254</sup> (2) recognizes that difference does not preclude the application of equality principles;<sup>255</sup> (3) accounts for issues of dependency in the context of employment;<sup>256</sup> (4) encourages communication and dialogue between parties;<sup>257</sup> and (5) recognizes as discrimination the deprivation of opportunities by individuals with disabilities to participate in community life.<sup>258</sup> In this section of the Article, I provide another example of an element of disability discrimination law that is consistent with communitarian theory, namely, the way in which it sometimes accounts for the interests of nonclaimants in determining the rights of plaintiffs. This element, however, differs from the others discussed previously because it may, in some circumstances, make it more difficult for ADA plaintiffs to succeed with their discrimination claims.

Under principles governing traditional discrimination law, a party defending itself from a discrimination charge cannot raise the costs of avoiding discrimination as a defense. As the Supreme Court has noted in the context of sex discrimination, "[t]he extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender."<sup>259</sup> As a result, it is not possible for a defendant in a race or sex discrimination case to argue that there are other individuals who have a better claim to the resources that must be expended in order to avoid discriminating against the plaintiff. As Mark Kelman notes, under traditional discrimination law, a plaintiff's claim is not "balanced against claims that could

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<sup>254</sup> See *supra* notes 115–41 and accompanying text.

<sup>255</sup> See *supra* notes 142–76 and accompanying text.

<sup>256</sup> See *supra* notes 177–97 and accompanying text.

<sup>257</sup> See *supra* notes 198–211 and accompanying text.

<sup>258</sup> See *supra* notes 234–51 and accompanying text.

<sup>259</sup> *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991) (citing *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716–18 & n.32 (1978) (rejecting cost defense raised by defendant arguing that female employees should make larger contributions to pension fund because they, on average, live longer)); see also *Robinson v. Lorillard Corp.*, 444 F.2d 791, 800 (4th Cir. 1971) (noting that "avoidance of the expense of changing employment practices is not a business purpose that will validate the racially differential effects of an otherwise unlawful employment practice.").

be made by nonparticipants in the suit that they are more worthy recipients of the resources the defendant is expected to expend.”<sup>260</sup>

In contrast to Title VII, the ADA and its regulations explicitly exempt defendants from discrimination liability when the costs of the accommodations in question are significant.<sup>261</sup> As a result, it is possible for a defendant under the ADA to avoid liability by showing that there are individuals other than the plaintiff who have a better or more valid claim to the resources that are the subject of the discrimination lawsuit.<sup>262</sup>

This is precisely what was at issue in *Olmstead* when the State argued that it should not be liable for discrimination under the ADA for failing to deinstitutionalize the plaintiffs the moment that their medical teams concluded that it was medically appropriate to place them in community-based treatment settings.<sup>263</sup> The State argued that the funds required for the plaintiffs’ deinstitutionalization were already committed elsewhere, including covering the institutionalization costs for those disabled individuals whose medical diagnoses made it necessary for them to remain institutionalized.<sup>264</sup>

The district court, in rejecting altogether the State’s cost-based defense, in effect rejected the idea that the interests of nonclaimants should be taken into account when determining the rights of the plaintiffs.<sup>265</sup> Although the court of appeals refused to adopt this categorical rule, it nonetheless, as already noted,

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<sup>260</sup> Kelman, *supra* note 19, at 836 (internal quotations omitted).

<sup>261</sup> For the undue hardship defense under Title I, see 42 U.S.C. § 12111(10) (2000); 29 C.F.R. § 1630.2(p) (2001). For the fundamental alteration defense under the regulations to Title II, see 28 C.F.R. § 35.130(b)(7) (2001). For the undue burden defense under Title III, see 42 U.S.C. § 12182(b)(2)(A)(iii) (2000). Title III also exempts places of public accommodation that were open to the public when the ADA became effective from the obligation to remove architectural and communication barriers when such removal is not “readily achievable.” 42 U.S.C. § 12182(b)(2)(A)(iv) (2000). “Readily achievable” is defined in the statute as “easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C. § 12181(9) (2000).

<sup>262</sup> Kelman argues that the ADA’s imposition of costs on employers makes it a redistributive statute that distinguishes it from Title VII. Kelman, *supra* note 19, at 840–45. Michael Stein, however, has argued persuasively that the enforcement of Title VII also imposes significant costs on employers. Stein, *supra* note 19, at 616–22. Regardless of whether the ADA is a redistributive statute in ways that distinguish it from Title VII, the following difference between the two statutes remains: only the ADA contains specific mechanisms that permit an accounting for the interests of nonclaimants in determining the equality rights of claimants. The *Olmstead* case is particularly interesting in this regard because the nonclaimants whose interests played a role in the case were, like the plaintiffs, individuals with disabilities. See *infra* notes 267–76 and accompanying text.

<sup>263</sup> See *supra* note 225 and accompanying text.

<sup>264</sup> See *supra* note 225 and accompanying text.

<sup>265</sup> See *supra* notes 220–22 and accompanying text.

limited the fundamental alteration defense to the balancing of the cost of the plaintiffs' deinstitutionalization against the State's entire mental health budget.<sup>266</sup>

A plurality of the Supreme Court had a more expansive understanding of the role that the interests of nonclaimants can play in determining the rights of claimants not to be discriminated against under the ADA than did either the district court or the court of appeals.<sup>267</sup> The plurality opinion began with the proposition that the obligation of the State to provide community-based treatment "is not boundless,"<sup>268</sup> even when it is undisputed, as it was by the time the case reached the Supreme Court, that such treatment was in the plaintiffs' best medical interests.<sup>269</sup> This is because the ADA regulations allow the state to refuse to modify programs when such modifications would constitute a fundamental alteration.<sup>270</sup> The plurality was concerned with the issue, raised but not elaborated upon by the court of appeals,<sup>271</sup> that the State may not be able to capture most of the savings associated with the less expensive (on a per-capita basis) community-based treatment, as compared to treatment in an institution, because it has to maintain some institutions open for those individuals for whom community-based treatment is inappropriate.<sup>272</sup>

The plurality, however, did not frame the issue only in terms of *costs*; it also spoke of the state's *obligations* to meet the *needs* of those individuals who, because of their more serious disabilities, have no alternative but to receive treatment in institutions. "[T]he ADA," the plurality argued,

is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. . . . Some individuals, like [the plaintiffs] in prior years, may need institutional care from time to time "to stabilize acute psychiatric symptoms." For other individuals, no placement outside the institution may ever be appropriate.<sup>273</sup>

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<sup>266</sup> See *supra* notes 229–33 and accompanying text.

<sup>267</sup> The discussion of the fundamental alteration defense in *Olmstead* was joined by only four Justices (Ginsburg, O'Connor, Souter, and Breyer). *Olmstead v. L.C.*, 527 U.S. 581, 585–86 (1999).

<sup>268</sup> *Id.* at 603.

<sup>269</sup> The State had argued before the court of appeals that there was a material issue of fact as to whether one of the plaintiffs was eligible for placement in a community-based program. *L.C. v. Olmstead*, 138 F.3d 893, 902 (11th Cir. 1998). The court of appeals concluded otherwise. *Id.* at 902–04. When the case reached the Supreme Court, "there [was] no genuine dispute concerning the status [of both plaintiffs] as individuals 'qualified' for noninstitutional care." *Olmstead*, 527 U.S. at 602–03.

<sup>270</sup> See 28 C.F.R. § 35.130(b)(7) (2001).

<sup>271</sup> See *supra* notes 229–30 and accompanying text.

<sup>272</sup> *Olmstead*, 527 U.S. at 604–05.

<sup>273</sup> *Id.* (citations omitted).

The plurality was troubled by the fact that the fundamental alteration standard applied by the court of appeals, namely, that a state's *entire* mental health budget should be taken into account in determining whether expenses associated with particular cases of deinstitutionalization constituted a fundamental alteration made "it . . . unlikely that a State . . . could ever prevail."<sup>274</sup> This is because the size of that budget will presumably always be considerably larger than the cost of deinstitutionalizing a few individuals.

As a result, the plurality applied a fundamental alteration standard that gave the State, as the Court put it, "more leeway."<sup>275</sup> The standard would "allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities."<sup>276</sup> In short, the needs of disabled individuals who were not plaintiffs in the case, coupled with the State's obligations toward those individuals, meant that the State was entitled to at least attempt to show that providing the plaintiffs with the remedy they sought, namely, immediate deinstitutionalization, should be denied.

It can be argued that the only reason why there was a tension in *Olmstead* between the interests of the plaintiffs and those of individuals with more severe disabilities who were in need of continued institutionalization was because the State allocated insufficient funds to provide for the needs of both. It can also be argued that the State should, as a matter of policy, allocate enough funds to meet the full needs of all of its mentally disabled citizens, including both the needs of individuals who must be institutionalized and of those for whom treatment in community-based settings is more appropriate. What interests us here, however, is the relief available under the ADA to plaintiffs in the *absence* of such full funding. It was the lack of such funding in *Olmstead*, after all, that led to the lawsuit. It is interesting to note in such circumstances the extent to which the rights of individuals with mental disabilities who are eligible to be deinstitutionalized and integrated into the community can depend on the needs of other individuals with mental disabilities who must remain institutionalized.

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<sup>274</sup> *Id.* at 603.

<sup>275</sup> *Id.* at 605.

<sup>276</sup> *Id.* at 604. It is interesting to note how the fundamental alteration defense was rendered more expansive at each successive stage of the *Olmstead* litigation. The district court refused to consider the defense altogether once it determined that the case involved unjustified segregation. *See supra* notes 220–22 and accompanying text. The court of appeals allowed the State to raise the defense, but set a fairly stringent standard that used the State's entire mental health budget as the basis for the determination of whether the placements of particular individuals in community-based programs would constitute a fundamental alteration. *See supra* notes 229–33 and accompanying text. Finally, the Supreme Court's plurality opinion made the defense considerably easier to meet. *See supra* notes 267–75 and accompanying text.



The connection between the rights of ADA claimants and those of disabled nonclaimants is also evident in the post-*Olmstead* case of *Williams v. Wasserman*.<sup>277</sup> In *Williams*, twelve mentally disabled patients who were residents of state psychiatric institutions sued the State of Maryland, challenging both the conditions of their institutionalization under the U.S. Constitution as well as the slow rate of their deinstitutionalization under the ADA.<sup>278</sup> On the latter claim, the court concluded that the plaintiffs could meet their prima facie burden of establishing that they were discriminated against because of their disability "by showing that they remained unjustifiably institutionalized despite their eligibility for community-based treatment."<sup>279</sup> The court, however, held that the pace at which the State was deinstitutionalizing individuals did not violate the ADA because to do so at a faster rate would constitute a fundamental alteration of its program.<sup>280</sup>

The court provided two principal arguments in support of its holding. First, it noted that it was hard to argue that Maryland was not moving quickly enough when it was a national leader in the deinstitutionalization of psychiatric patients and in the placement of them in a wide range of community-based settings.<sup>281</sup> The State's policy of encouraging the deinstitutionalization of patients led to a significant drop in the average daily population in Maryland's psychiatric institutions, from 7,114 in 1970 to approximately 1,200 in 1997.<sup>282</sup> The policy also led to the closing of at least five state institutions and the reduction in size of many others.<sup>283</sup>

Second, while the court recognized that the cost per patient of community-based treatment is generally less than the cost of treatment in an institution, it followed the plurality in *Olmstead* in rejecting such a "simple comparison."<sup>284</sup> The court noted "that the State will need to maintain some threshold number of hospital beds indefinitely for acute and, in a small percentage of cases, long-term care."<sup>285</sup> The court added that several of the plaintiffs had a history of

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<sup>277</sup> *Williams v. Wasserman*, 164 F. Supp. 2d 591 (D. Md. 2001).

<sup>278</sup> The court held that the State had not violated the plaintiffs' due process rights under the U.S. Constitution. *Id.* at 616-27.

<sup>279</sup> *Id.* at 630.

<sup>280</sup> *Id.* at 631-38.

<sup>281</sup> The community-based treatment options made available by the State "include[d] alternative living units . . . for one to three-person homes, small group homes for four to eight persons, and community-supported living arrangements . . . , where drop-in staff support individuals living in their own homes. Day programs in the community offering behavioral, educational, and vocational support services also were made available." *Id.* at 634 (citations omitted).

<sup>282</sup> *Id.*

<sup>283</sup> *Williams*, 164 F. Supp. 2d at 634.

<sup>284</sup> *Id.* at 636 (quoting *Olmstead v. L.C.*, 527 U.S. 581, 604 (1999)).

<sup>285</sup> *Id.*

reinstitutionalization after having been previously treated in community-based settings and that the State needed to be prepared for the eventuality that they might need institutional care in the future.<sup>286</sup> Because of the need to maintain institutional care as a viable option for some, the court concluded that no significant cost savings would accrue *for several years* after the deinstitutionalization of patients.<sup>287</sup> Given the time lag before the accrual of fiscal savings, "and considering the need to maintain a minimum number of hospital beds and also to fund placements for other persons in need of community treatment, the State's progress in placing members of the [mentally disabled] population into the community has been acceptable."<sup>288</sup> As a result, the court held that to require "[t]he immediate shift of resources sought by plaintiffs [from institutional care to community-based care] would have resulted in a fundamental alteration of the State's provision of services within the meaning of *Olmstead*."<sup>289</sup>

The way in which the *Olmstead* plurality (as well as the court in *Williams*) addressed the state's obligation to deinstitutionalize individuals with disabilities is consistent with a fundamental principle of communitarian theory, namely, that individual rights should not be viewed in isolation from the interests of others.<sup>290</sup> Communitarians, as we have seen, are critical of what they take to be the excessive individualism of liberal theory.<sup>291</sup> Communitarians argue that liberal

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<sup>286</sup> *Id.* at 637.

<sup>287</sup> *Id.* at 637–38. The tension between the need to transfer eligible individuals out of state institutions and the need to retain those institutions as viable options for others is reflected in cases where individuals with disabilities have sought to rely on *Olmstead* to sue states for improper transfers from institutions to community settings. Courts have on the whole refused to read *Olmstead* as requiring the continued institutionalization of individuals with disabilities. See Richard C. *ex rel.* Kathy B. v. Houstoun, 196 F.R.D. 288, 292 (W.D. Pa. 1999) (holding that while *Olmstead* under certain circumstances requires the placement of disabled individuals in community-based settings, nothing in *Olmstead* precludes such placements); Black v. Dep't of Mental Health, 100 Cal. Rptr. 2d 39, 49–51 (Ct. App. 2001) (rejecting an ADA cause of action for the allegedly improper transfer of mentally disabled individual from an institution to a community-based treatment setting). But see *In re Easley*, 771 A.2d 844, 850–55 (Pa. Commw. Ct. 2001) (finding that the State improperly transferred an individual with a severe developmental disability from an institution to a community group home).

<sup>288</sup> *Williams*, 164 F. Supp. 2d at 638.

<sup>289</sup> *Id.* In litigation challenging Hawaii's operation of its program for home and community-based services for developmentally disabled individuals under, inter alia, the ADA, the State argued in a motion for summary judgment that to increase the number of individuals who were eligible for community services, as the plaintiffs sought, "would necessarily decrease . . . funding [for institutional services], which would be inequitable to that program." *Makin ex rel.* Russell v. Hawaii, 114 F. Supp. 2d 1017, 1034 (D. Haw. 1999). The court ruled, however, that the State failed to show "that any modification to the program would fundamentally alter it" and denied the defendant's motion as to the ADA cause of action. *Id.* at 1035.

<sup>290</sup> See *supra* notes 93–96 and accompanying text.

<sup>291</sup> See *supra* notes 93–96 and accompanying text.

theory too often prioritizes the interests of individual rights claimants at the expense of the interests of others and of the general welfare.<sup>292</sup>

Consistent with communitarian ideas, the rights of the plaintiffs in *Olmstead* were determined, at least in part, by the needs of other disabled individuals who were not parties to the case. Even in the context of what might otherwise seem like a clear and straightforward right on the part of the plaintiffs not to be isolated and segregated, the consequences of the enforcement of that right for the interests of others mattered a great deal. The *Olmstead* plurality sought to balance the plaintiffs' right to equality with the needs and interests of other individuals with disabilities. In this way, the plurality linked together the interests of those who are best treated outside of institutions with those who are best treated inside of them. The plurality found it problematic to speak of the rights to equality of individuals in each group independently of those in the other group, at least in the not uncommon circumstance of insufficient financial resources.<sup>293</sup>

It could be argued that on the issue of deinstitutionalization, at least, individuals with disabilities would be better off under a discrimination model that views segregation as per se impermissible and that demands desegregation as a matter of right.<sup>294</sup> It is difficult to disagree with this proposition as long as our focus remains exclusively on the individuals bringing the discrimination claim.

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<sup>292</sup> See *supra* notes 93–96 and accompanying text.

<sup>293</sup> Another example of the way in which disability discrimination law accounts for the interests of nonclaimants is illustrated by the holding of *Barth v. Gelb*, 2 F.3d 1180 (D.C. Cir. 1993). The court in *Barth* held that the negative impact on the employer's business operation caused by the lower morale of fellow employees that results from an accommodation for a disabled employee is a legitimate factor to be considered in determining whether the accommodation constitutes an undue hardship for the defendant. *Id.* at 1189–90. The Supreme Court has gone even further by suggesting in dicta that negative effects on other employees arising from an accommodation may make that accommodation unreasonable independent of its impact on the employer's business operation. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002):

[A] demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—say, because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.

*Id.* at 400–01.

The direct threat defense also recognizes the interests of others in determining the equality rights of ADA claimants. The ADA does not mandate accommodations that would create “a significant risk to the health or safety of others.” 42 U.S.C. § 12111(3) (2000). The Supreme Court has upheld the EEOC's position that the direct threat defense includes within its scope risks to the health or safety of ADA plaintiffs. See *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002).

<sup>294</sup> This was the approach taken by the district court in *Olmstead*. See *supra* notes 220–22 and accompanying text.

However, if the mandate to desegregate negatively affects other individuals with disabilities who need to be institutionalized, then it is at least debatable whether, in the absence of full funding, it is best to have a regime that focuses on equality claims as entitlements as of right, or a regime that, consistent with communitarian theory, takes into account the implications and consequences of immediate desegregation on other disabled individuals.<sup>295</sup> Whatever our policy preferences may be in these difficult cases, however, the fact that the interests of nonclaimants can play a role in determining the rights to equality of claimants is another example of an important element of disability discrimination law that is consistent with communitarian theory.

### III. DIFFERENCES AND THEIR POLITICAL IMPLICATIONS

In a recent article, Professor Samuel Bagenstos argues that it is crucial to think through the political consequences of efforts to emphasize either the similarities or differences between the ADA and other civil rights laws.<sup>296</sup> He notes that when the ADA was enacted, many civil rights advocates viewed its accommodation requirement as novel and as “a major expansion of the existing civil rights paradigm.”<sup>297</sup> The hope at the time was that the ADA’s perceived expansiveness would translate into an extension of other civil rights laws.<sup>298</sup> “As the judicial and societal reaction to the ADA evolved [in the direction of backlash and skepticism], however, the ADA’s accommodation requirement increasingly became an albatross around the neck of civil rights advocates.”<sup>299</sup> This led advocates to change from a front action strategy to a rear action strategy, that is, from seeking to use the ADA as a means to expand other civil rights laws to aiming to protect those laws from the growing criticism directed at the ADA.<sup>300</sup> Even after this strategic shift, however, civil rights supporters continued to emphasize differences between the ADA and other civil rights statutes in the

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<sup>295</sup> See Eva Feder Kittay, *At Home with My Daughter*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 64, 73 (Leslie Pickering Francis & Anita Silvers eds., 2000) (noting that for some individuals with severe disabilities, integration into the community, and the associated benefits of independent living and economic self-sufficiency, is not a realistic goal).

<sup>296</sup> See Bagenstos, *supra* note 20, at 901–21.

<sup>297</sup> *Id.* at 909.

<sup>298</sup> Professor Bagenstos argues that the thinking among civil rights advocates at the time of the ADA’s enactment was that “[i]f people with disabilities had the right to accommodation [as a mode of civil rights law, then] . . . [w]hy stop there? Why shouldn’t the right to accommodation extend to everyone protected by civil rights laws?” *Id.* at 908.

<sup>299</sup> *Id.* at 910. I discuss the backlash and skepticism in *infra* notes 310–13 and accompanying text.

<sup>300</sup> See Bagenstos, *supra* note 20, at 910–15.

expectation that this would shield the latter from objections raised against the former.<sup>301</sup>

Professor Bagenstos argues that there are no meaningful differences between the discrimination prohibitions of the ADA and those of traditional discrimination law.<sup>302</sup> He also suggests that it makes more sense, from a political perspective, to emphasize the similarities (as opposed to the differences) between the ADA and other civil rights statutes because doing so helps protect the ADA from further criticism. For example, to the extent that the obligation to accommodate under the ADA is, as Professor Bagenstos argues, consistent with widely accepted antidiscrimination principles, then to criticize the ADA means to criticize antidiscrimination principles that have long been embraced by our society. As he puts it, “[o]ne who challenges accommodation mandates must recognize that such challenges implicate antidiscrimination law more generally.”<sup>303</sup>

Given that this Article has sought to emphasize some of the different ways in which disability discrimination law goes about providing for equality when compared to traditional discrimination law, it should come as no surprise that I disagree with Professor Bagenstos’s conclusion that there are no meaningful distinctions between the two. As I have argued here, the fact that disability discrimination law, for example, requires the differential treatment of the protected class<sup>304</sup> as well as an accounting for (1) the dependency of

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 837–70.

<sup>303</sup> *Id.* at 921; *see also* Crossley, *supra* note 20, at 863 (noting that “if the ADA is understood as lying outside of our society’s ongoing antidiscrimination project, the Act may be deprived of the moral authority that antidiscrimination laws . . . tend to enjoy.”) (footnote omitted).

<sup>304</sup> *See supra* notes 142–76 and accompanying text. Professor Bagenstos questions the consensus in the literature that argues that disability discrimination law is different from traditional discrimination law because only the former requires the employer to take the protected trait into account. *See* Bagenstos, *supra* note 20, at 863–65. He points out that “[e]mployers use categorical statistical proxies all the time” to help them make assessments about employees and potential employees. *Id.* at 865. He argues that traditional discrimination law does require employers to take race and gender into account by prohibiting them from relying on categorical judgments based on those traits (as opposed to nonprotected traits) in making employment-related decisions. *Id.* (citing David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 111, 114). Traditional discrimination law, in other words, forces employers to take protected traits into account by requiring them to treat those traits differently than other (nonprotected) traits. As a result, Professor Bagenstos suggests, it is not correct to argue that accommodation law requires employers to take the protected trait into account while traditional discrimination law does not. *Id.* Despite Professor Bagenstos’s observations, however, it seems to me that this crucial difference between disability discrimination law and traditional discrimination law remains: in the former, the employer must account for the protected trait in fashioning employment practices that are meant to provide for equality of opportunity, while in the latter equality of opportunity is promoted by making sure

employees,<sup>305</sup> (2) the importance of communication in the attainment of equality goals,<sup>306</sup> and (3) the interests of nonclaimants<sup>307</sup> all make disability discrimination law distinguishable in significant ways from traditional discrimination law. This is not to say, of course, that there is little overlap between the two. Professor Bagenstos is correct, for example, that they both seek to reduce subordination and social inequality.<sup>308</sup> But there are also, as I have argued throughout this Article, important differences between both sets of laws in terms of their understandings of how equality is best attained.

Despite my disagreement with Professor Bagenstos about the extent of the overlap between disability discrimination law and traditional discrimination law,<sup>309</sup> I share his political concerns regarding the ways in which differences between the ADA and other civil rights statutes can be exploited by critics to the detriment of the former. It seems to me that the burden is on those of us who emphasize differences between the ADA and other civil rights statutes to account for the ways in which those differences, whether theoretical or doctrinal, may or may not further fuel the backlash and skepticism toward the ADA. This is what I will attempt to do in this last part of the Article.

Once we leave the world of academic theory and enter the real world where the ADA is litigated and debated, we are confronted with the reality, as has been noted by many commentators, of a growing judicial and political backlash against

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that the employer does not fashion employment practices that are based, in part, on the existence of the protected trait.

Professor Bagenstos also points to the fact that feminists have long argued, and Title VII and the Pregnancy Discrimination Act so provide, that in order to guarantee equality in the workplace, the pregnancy of female employees must be accommodated by employers. *Id.* at 859–60. He uses the pregnancy example to support his thesis that there is little difference between disability discrimination law and traditional discrimination law. *Id.* It seems to me, however, that the pregnancy example is an isolated exception to the otherwise clear mandate under traditional discrimination law that employers not take the protected trait into account in fashioning employment related policies. The other possible exception may be affirmative action requirements, but affirmative action is not usually thought of as a form of accommodation (though accommodations are sometimes thought to be a form of affirmative action, *see* Ball, *supra* note 24, at 966–87) and Professor Bagenstos does not argue in his article that it is.

<sup>305</sup> *See supra* notes 177–97 and accompanying text.

<sup>306</sup> *See supra* notes 198–211 and accompanying text.

<sup>307</sup> *See supra* notes 259–95 and accompanying text.

<sup>308</sup> Bagenstos, *supra* note 20, at 859 (arguing “that the goals of antidiscrimination and accommodation requirements are parallel, for both seek to dismantle a system of group-based subordination and the patterns of occupational segregation that support that system.”) (emphasis omitted).

<sup>309</sup> This is my terminology. Professor Bagenstos distinguishes between antidiscrimination law and accommodation law. *See, e.g., id.* (arguing that there is an equivalence between antidiscrimination law and accommodation law).

the ADA.<sup>310</sup> The courts have, on the whole, interpreted the statute extremely narrowly, considerably reducing the chances that ADA plaintiffs will succeed with their claims.<sup>311</sup> In fact, only prisoners are less likely than ADA employment plaintiffs to win cases in the federal courts.<sup>312</sup> The backlash and skepticism toward the ADA has not been limited to courtrooms, however. The portrayals of the ADA accommodation requirement in the media are also frequently negative. Those portrayals often “depict[ ] th[e] requirement as giving lazy workers an unfair excuse to avoid unpleasant job tasks and imposing irrational requirements on employers to tolerate disruptive and dangerous employees.”<sup>313</sup>

There is by now in this country—four decades after the enactment of the civil rights laws of the 1960s—a strong consensus that intentional discrimination on the basis of race and sex by employers, landlords, and places of public accommodation is unacceptable and is appropriately prohibited by law.<sup>314</sup> (I will refer to this consensus as the “strong antidiscrimination consensus.”) The only critics of laws that protect individuals against intentional discrimination on the basis of race and sex are libertarians who believe (1) that the attainment of equality goals should not trump the freedom to contract and (2) that the free market can on its own discourage most instances of discrimination.<sup>315</sup> Libertarian arguments, however, have not gained much political traction. There is no current move afoot, even among the most conservative of politicians, to eliminate or even

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<sup>310</sup> See, e.g., Diller, *supra* note 149; Krieger, *supra* note 149; Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000).

<sup>311</sup> Ruth Colker's studies have shown that defendants win more than 90% of ADA cases at the trial level. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 107–08 (1999). When defendants appeal the few cases that they lose, they succeed in getting complete or partial reversals in 60% of the cases. Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 248 (2001). The odds of plaintiffs succeeding on appeal, however, are only about 10%. *Id.*

<sup>312</sup> Bagenstos, *supra* note 20, at 910–11.

<sup>313</sup> *Id.* (citations omitted). Much of the negative portrayal of the ADA and its plaintiffs in the media seems to be based on the widely-held view that ADA lawsuits are often brought by individuals who are neither disabled nor deserving of legal protection. See Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223, 224–35 (2000). It can be argued, given the narrow ways in which courts have interpreted the definition of disability under the ADA, that many judges share that view. See, e.g., Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About it?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000); Tucker, *supra* note 310.

<sup>314</sup> See Bagenstos, *supra* note 20, at 833–35; Diller, *supra* note 149, at 40.

<sup>315</sup> The most influential libertarian critic of discrimination laws in the legal academy is Richard Epstein. RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

weaken the basic antidiscrimination principles codified in statutes such as Title VII and the Fair Housing Act.

Discrimination law that goes beyond proscribing intentional discrimination on the basis of race and sex, however, is more controversial. The strong antidiscrimination consensus that exists in this country begins to break down once we move away from the paradigmatic discrimination case—for example, someone refusing to hire or to serve individuals because of their race. The theory of disparate impact, which does away with the requirement of discriminatory intent and instead focuses on the effects of a defendant's neutral policies,<sup>316</sup> has been much criticized by commentators<sup>317</sup> and has been narrowed through the years by skeptical courts.<sup>318</sup> The use of affirmative action as a way of addressing past discrimination has also, of course, been the subject of a great deal of debate and controversy.<sup>319</sup>

The ADA's accommodation requirement has also been the subject of a great deal of contention and disagreement.<sup>320</sup> However, I do not believe, for the reasons noted below, that emphasizing the feminist and communitarian elements of disability discrimination law will further encourage criticism and skepticism of the ADA.

Let me begin with a discussion of the communitarian elements of disability discrimination law noted in Part II. As already mentioned, the Supreme Court's opinion in *Olmstead v. L.C.*<sup>321</sup> affirms two important principles of communitarian theory: first, that participation in community life plays a crucial role in the lives of individuals, and second, that the interests of nonclaimants should be accounted for when determining the rights of claimants.<sup>322</sup> As also noted in Part II, the State of Georgia in *Olmstead* unsuccessfully argued that it did not discriminate against the plaintiffs within the meaning of the ADA—even though it kept them

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<sup>316</sup> See 42 U.S.C. § 2000e-2(k) (2000); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

<sup>317</sup> E.g., Bagenstos, *supra* note 20, at 835 (noting that the need for disparate impact protection is a highly contested issue among commentators).

<sup>318</sup> See, e.g., *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1115–16 (D.D.C. 1987) (holding that disparate impact claims under the Fair Housing Act are not available against private landlords).

<sup>319</sup> See, e.g., AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION? (Francis Beckwith & Todd Jones eds., 1997); THE AFFIRMATIVE ACTION DEBATE (George Curry ed., 1996); TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1997); CHARLES LAWRENCE III & MARI MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997).

<sup>320</sup> See Diller, *supra* note 149, at 39–47 (analogizing between the legal and cultural skepticism toward affirmative action and that toward the accommodation requirement of the ADA).

<sup>321</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999).

<sup>322</sup> See *supra* notes 238–47 and accompanying text.



institutionalized longer than was medically necessary—because it did not treat another similarly situated group better than it did the plaintiffs.<sup>323</sup> The fact that the Court in *Olmstead* was not troubled by the lack of a similarly situated comparison group<sup>324</sup> could in theory be used by skeptics of the ADA (or at least by skeptics of broad interpretations of the ADA) to further criticize the statute.<sup>325</sup> In the paradigmatic case of intentional discrimination on the basis of race or sex, after all, there is usually an identifiable similarly situated group (e.g., white males) that received a benefit not made available to the plaintiff in question. To the extent, after *Olmstead*, that the existence of such a group is not necessary in order for a plaintiff to succeed with an ADA claim, it would seem to render the ADA suspect, at least if we are using the strong antidiscrimination consensus noted above as the baseline for comparison.

It would seem, however, that reasonable people could agree that there is something inherently problematic about the state unnecessarily keeping individuals institutionalized longer than is medically necessary, even if the state, in doing so, is not treating another class of individuals in a better or more advantageous manner. It may very well be that some think the issue of unnecessary institutionalization of individuals with disabilities raises concerns of personal autonomy and freedom as opposed to ones of equality and discrimination per se, but that does not make the unnecessary institutionalization any less problematic. In any event, the Court in *Olmstead* based its understanding of what Congress required of the state under Title II of the ADA (in terms of its obligations not to segregate individuals with disabilities) on a rather non-controversial position, namely, that participation by individuals in community life and in ongoing and meaningful relationships with others is something to be valued and protected. It seems unlikely that such a non-controversial position will further fuel the backlash against the ADA.

The same holds true for the other important communitarian element of *Olmstead*, and of disability discrimination law more generally, namely, that it is sometimes proper to take into account the interests of nonclaimants in determining the rights of claimants under the ADA.<sup>326</sup> This component of disability discrimination law, in fact, may make the able-bodied *more* sympathetic toward the ADA given that their interests may be taken into account

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<sup>323</sup> See *supra* notes 267–76 and accompanying text discussing the plurality opinion.

<sup>324</sup> See *supra* notes 234–48 and accompanying text.

<sup>325</sup> As discussed in Part II, Justice Thomas argued in his dissent in *Olmstead* that a plaintiff, in order to succeed in a discrimination claim, must show that the defendant treated differentially a group of individuals to which the plaintiff does not belong. See *supra* note 235 and accompanying text.

<sup>326</sup> See *supra* notes 259–95 and accompanying text.

in determining the scope of the equality rights of individuals with disabilities under the statute.<sup>327</sup>

I do not anticipate, therefore, that emphasizing the elements of disability discrimination law that are consistent with communitarian theory will be particularly problematic in terms of further fueling the backlash and skepticism toward the ADA. The same can be said for many of the feminist elements of disability discrimination law. The idea that employers must account for the dependency of their employees with disabilities,<sup>328</sup> for example, may at first blush seem like a radical extension of the scope of American discrimination law. Capitalist norms, after all, tell us that employees should be evaluated based on their individual talents and abilities. To the extent that some employees need the assistance of others to perform their jobs may make it seem, under those norms, that they are not qualified for the positions in question.

On further consideration, however, all employees are to some extent dependent upon the assistance provided by employers. As noted in Part II, employers as a matter of course provide assistance to able-bodied employees by making items such as chairs and lighting available to them.<sup>329</sup> The ADA simply requires that employers account for the dependencies of *all* their employees, and not just those of the able-bodied.<sup>330</sup> In this sense, the dependency component of disability discrimination law imposes a familiar equality obligation on employers, namely, that once an employer decides to provide the kind of assistance its employees need in order to be able to perform their jobs successfully, it cannot withhold assistance on the basis of disability. The fact that the *type* of assistance required by individuals with disabilities is likely to be different from that required by the able-bodied (e.g., a ramp for a wheelchair as opposed to a chair) would not seem to be relevant.

It could be argued that the fact that what is sometimes at issue in accommodation cases is a principle familiar to traditional discrimination (namely, that benefits made available to some cannot be denied to others on the basis of a protected trait) shows that there is not much difference between disability discrimination law and traditional discrimination law. The crucial distinction, however, is this: There is nothing in traditional discrimination law that acknowledges the role that dependency and the assistance of others plays in the ability of individuals to perform their jobs. The determination of whether a Title VII plaintiff, for example, is qualified for a particular position is made

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<sup>327</sup> Although this was not the case in *Olmstead*, it is the case in other types of cases where courts have concluded that the interests of others (primarily able-bodied individuals) can be taken into account in determining the rights of plaintiffs under the ADA. See sources cited in *supra* note 293.

<sup>328</sup> See *supra* notes 177-97 and accompanying text.

<sup>329</sup> See *supra* text at Part II.B.2.

<sup>330</sup> See *supra* notes 177-97 and accompanying text.

independent of any assistance that the employer may provide to that employee. Under Title VII, whether an employer wants to provide assistance, for example by subsidizing the training or education of the employee so that she can become qualified, is within the unfettered discretion of the employer (as long, of course, as it does not make distinctions on the basis of race or sex).

Disability discrimination law, on the other hand, requires the employer to account for the dependency of and need for assistance by its employees with disabilities. Whether an employee with a disability is qualified for a position under the ADA is determined only after the employer, through reasonable accommodations, accounts for the dependency and needs of that employee. Disability discrimination law obligates employers to account for the dependency and needs of their employees in ways that Title VII does not.

As for the obligation of employers to engage in an interactive process with disabled employees who request accommodations, which we have seen is consistent with both feminist and communitarian theory,<sup>331</sup> it could be argued that the requirement is overly intrusive because it micromanages the relationship between employers and employees in ways that traditional discrimination law does not. There is nothing in Title VII, for example, that *requires* employers to engage in an interactive process with their employees to determine how workplace practices should be changed in order to assist those employees with their job-related tasks.

As we have seen, however, the idea of a mandated interactive process makes a great deal of sense in the disability discrimination context because of the type of information to which each side has access.<sup>332</sup> The employee with a disability who seeks an accommodation has better knowledge of his or her disability while the employer has better knowledge of workplace requirements and needs. By encouraging communication and dialogue, the ADA makes it more likely that an accommodation that is reasonable and meets the needs of both parties will be formulated and implemented.<sup>333</sup> An employer who engages in an interactive process in good faith can, at relatively little cost, develop an accommodation plan that will allow it to meet its production requirements while making it more likely that it will afford employees with disabilities with an equal opportunity to compete.

In many ways, of all the components of disability discrimination law discussed in this Article, the one that has the greatest potential for furthering the backlash and skepticism toward the ADA is the idea of mandated differential treatment as a means of attaining equal opportunity for individuals with disabilities.<sup>334</sup> In fact, prior to the Court's holding in *U.S. Airways, Inc. v. Barnett*

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<sup>331</sup> See *supra* notes 198–211 and accompanying text.

<sup>332</sup> See *supra* notes 198–211 and accompanying text.

<sup>333</sup> See *supra* notes 198–211 and accompanying text.

<sup>334</sup> See *supra* notes 142–76 and accompanying text.

that the ADA often requires differential or preferential treatment of employees with disabilities in order to attain its antidiscrimination goals,<sup>335</sup> several courts and commentators had argued that such treatment was inconsistent with other civil rights laws and with congressional intent.<sup>336</sup>

As explained in Part II, the fact that the ADA operates under a difference (as opposed to a sameness) model of equality distinguishes it from other civil rights laws because the ADA (in accommodation cases) does not require covered entities to ignore the protected trait.<sup>337</sup> Instead, the ADA requires those entities to take the protected trait into account in fashioning accommodations—accommodations that are not made available to other employees—in order to meet their obligation to provide equal opportunity to individuals with disabilities. In this sense, the kind of differential treatment required by the ADA can, at first blush, be analogized to affirmative action and, as a result, can be used to further criticize the ADA.<sup>338</sup>

I have elaborated elsewhere on the legitimate and necessary role that differential or preferential treatment plays in the attainment of the ADA's goals and on the crucial differences between reasonable accommodation and affirmative action obligations.<sup>339</sup> What is important to note for our purposes here is that although the ADA often requires that employers provide their disabled employees with accommodations that are not made available to nondisabled employees, this does not mean that the former receive an unfair advantage over the latter. The ADA calls for differential treatment of employees with disabilities

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<sup>335</sup> U.S. Airways, Inc., v. Barnett, 535 U.S. 391, 397 (2002). For a discussion of *Barnett*, see *supra* notes 153–61 and accompanying text. See also Ball, *supra* note 24, at 957–66 (discussing arguments raised by the defendant in *Barnett* as to why the ADA never requires preferential treatment and explaining why the Court was correct in rejecting them).

<sup>336</sup> See, e.g., Wernick v. Fed. Res. Bank, 91 F.3d 379, 384–85 (2d Cir. 1996) (holding that an employer under the ADA was only obligated “to treat [an employee with a disability] in the same manner that it treated other similarly qualified candidates.”) (emphasis added); Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 679 (7th Cir. 1998) (concluding that “a nondiscrimination statute” such as the ADA is not a “mandatory preference statute”); Terrell v. USAir, 132 F.3d 621, 627 (11th Cir. 1998) (arguing that “[w]e cannot accept that Congress, in enacting the ADA, intended to grant preferential treatment for disabled workers.”); Jennifer Beale, Comment, *Affirmative Action and Violation of Union Contracts: The EEOC's New Requirements under the Americans with Disabilities Act*, 29 CAP. U. L. REV. 811, 823 (2002) (arguing that “[r]equiring reassignment of a disabled person over a non-disabled person, based on the disability, is a preference favoring the disabled” which is not required under the ADA); Thomas F. O’Neil III, & Kenneth M. Reiss, *Reassigning Disabled Employees under the ADA: Preferences under the Guise of Equality?*, 17 LAB. LAW. 347, 359 (2001) (arguing that “[p]referential treatment . . . is not consistent with the fundamental notion of a statutorily established level playing field.”).

<sup>337</sup> See *supra* notes 142–76 and accompanying text.

<sup>338</sup> See Diller, *supra* note 149, at 39–47.

<sup>339</sup> Ball, *supra* note 24.

when necessary to remove employment-related barriers to job performance in order to provide those employees with an equal opportunity to compete.<sup>340</sup> The able-bodied do not confront the same types of barriers and thus it is not necessary for the law to impose on employers an obligation to accommodate them.

It is perhaps easy to assume that if the law requires an employer to make changes in workplace practices in order to accommodate an employee in a certain way, that such changes are unfair to others who are not eligible for the same type of entitlement. The type of differential treatment required by the ADA, however, is not unfair to others because it is meant to level the playing field rather than to place the employee with a disability in a position of advantage over other employees.<sup>341</sup> In short, the differential treatment required by the ADA is necessary in order to place individuals with disabilities in a position where they are similarly situated to their nondisabled counterparts.<sup>342</sup>

Feminist theory can contribute to our understanding of this component of disability discrimination law because it helps us comprehend why it is that differential treatment is sometimes necessary for the attainment of equality goals. As noted in Part I and Part II, it is feminist scholars who have most extensively addressed how a failure to account for differences can interfere with the attainment of equality.<sup>343</sup> Feminist theorists have argued persuasively that a regime of laws and practices that simply seeks to treat men and women in precisely the same ways fails to place women on an equal footing with men.<sup>344</sup> When you begin from a position of disadvantage, equality law must account, as best as possible, for that disadvantage. Our principles of equality, feminist theory teaches us, should not assume that parties come before the law already similarly situated.

These insights provided by feminist theory help us understand why it is that disability discrimination law often requires the differential treatment of

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<sup>340</sup> See *supra* notes 142–76 and accompanying text.

<sup>341</sup> Ball, *supra* note 24, at 960–63; see also Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 971 (2003) (arguing “that preferential treatment is not inimical to the ADA’s purpose, but part and parcel of the statutory design for enabling the disabled to move into the mainstream of American life and its workforce.”); Diller, *supra* note 149, at 41 (arguing that “the reasonable accommodation requirement is not a means of giving people with disabilities a special benefit or advantage; rather, it is a means of equalizing the playing field so that people with disabilities are not disadvantaged by the fact that the workplace ignores their needs.”).

<sup>342</sup> See Ball, *supra* note 24 at 960–63. As already noted, disability discrimination law—unlike traditional discrimination law—becomes applicable *before* parties are similarly situated. In the area of disability law, in other words, the equality claimant often relies on the operation of law in order to become similarly situated to others. See *supra* notes 143–77 and accompanying text.

<sup>343</sup> See *supra* notes 44–64 and 162–69 and accompanying texts.

<sup>344</sup> See *supra* notes 44–64 and 162–69 and accompanying texts.

individuals with disabilities. Without such treatment, individuals with disabilities would frequently be unable to compete with those individuals (the able-bodied) whose needs and interests are, as a matter of course, taken into account by employers in formulating and implementing employment practices.<sup>345</sup>

With the possible exception of the embracing by disability discrimination law of a difference model of equality, then, the other elements of that law that are consistent with feminist and communitarian theory should not, in my estimation, contribute to the current judicial and political backlash against the ADA. The fact that there are differences between disability discrimination law and traditional discrimination law should not lead to greater skepticism of the former. Instead, differences that are acknowledged, explained, and defended will (hopefully) lead to a better understanding of, and a greater sense of legitimacy for, the social task of providing individuals with disabilities with meaningful equality.

### CONCLUSION

The idea that the ADA requires covered entities to provide disabled individuals with something more than equality has been advanced by some commentators.<sup>346</sup> My view is that the ADA does not require more than equality. Instead, the ADA, as I have argued in this Article, seeks to provide equality through means that are, in some instances, different from those utilized by traditional discrimination laws. It is a mistake, in my estimation, to believe that equality can be promoted for all groups in precisely the same ways. We should therefore be open to, rather than suspicious of, differences among the means through which society promotes equality.

As this Article has sought to illustrate, there are crucial elements of disability discrimination law that are consistent with feminist theory or communitarian theory, or both, and are, therefore, in some tension with liberal theory. The principles of equality as codified and implemented by statutes such as the ADA reflect a more nuanced assessment of what is required to provide individuals with equal opportunity than the formalistic liberal understanding of equality that focuses on similar treatment for the (already) similarly situated. The fact that disability discrimination law accounts for issues such as the relationships, differences, and dependencies among individuals, as well as the importance to individuals of community life and of communication and dialogue with others, makes the normative underpinnings of that law more complex than that of discrimination laws that seek to prohibit differential treatment on the basis of race

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<sup>345</sup> As already noted, the (initial) competitive disadvantage of individuals with disabilities is most often the result of limitations imposed by socially constructed barriers (both tangible and intangible) rather than the result of intrinsic differences between disabled and nondisabled individuals. See *supra* note 174 and accompanying text.

<sup>346</sup> See sources cited in *supra* note 19.

and sex. An understanding of feminist theory and of communitarian theory helps us better comprehend how it is that disability discrimination law goes about promoting equality for individuals with disabilities.

